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**U.S. Department of Labor**
Office of Administrative Law Judges
John W. McCormack Post Office and Courthouse
Boston, Massachusetts 02109
Room 507
(617) 223-9355
(617) 223-4254 (FAX)

Date: October 15, 1997

Case Nos.: 89-ERA-07
89-ERA-17

IN THE MATTER OF

**THOMAS J. SAPORITO, JR.**,
Complainant

v.

**FLORIDA POWER & LIGHT CO.**,
Respondent

On Behalf of Complainant:[1]
Philip H. Forbes, Esq.
Miller and Forbes
11382 Prosperity Farms Road, Ste. 227
Palm Beach Gardens, FL 33410

On Behalf of Respondent:
James S. Bramnick, Esq.
Paul C. Heidmann, Esq.
Muller, Mintz, Kornreich, Caldwell,
Casey, Crosland & Bramnick, P.A.
First Union Financial Center, Suite 3600
200 S. Biscayne Boulevard
Miami, FL 33131-2338

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Before:
DAVID W. DI NARDI
Administrative Law Judge

## RECOMMENDED DECISION AND ORDER ON REMAND

This is a proceeding under the Energy Reorganization Act of 1974, 42 U.S.C. §5851 (hereinafter "the Act" or "the ERA") and the implementing regulations found in 29 C.F.R. Part 24. Pursuant to the Act, employees of licensees of or applicants for a license from the Nuclear Regulatory Commission (hereinafter "the NRC") and their contractors and subcontractors may file complaints and receive certain redress upon a showing of being subjected to discriminatory action for engaging in a protected activity. The above-captioned matter proceeded to an original hearing before Chief Judge Anthony J. Iacobo on February 1-3 and February 9, 10, 13 and 14, 1989. Judge Iacobo issued his Recommended Decision and Order on June 30, 1989, recommending that the complaints be denied. On June 3, 1994, Secretary of Labor Reich issued his Decision and Remand Order, in which he agreed with Judge Iacobo's recommendation concerning claim no. 89-ERA-7. Secretary Reich, however, remanded case no. 89-ERA-17 for application of the dual motive analysis. The hearing on remand was held before the undersigned Administrative Law Judge on January 21 - 24, 27 - 30, and February 20 - 21, 1997. This Judge, having duly considered all the evidence of record, hereby **RECOMMENDS** that this complaint be **DENIED** because Respondent has proven, by a preponderance of the evidence, that it would have discharged Complainant even in the absence of the alleged illegitimate motive.

Post-hearing evidence has been admitted as follows[2] :

| EXHIBIT | TITLE OF DOCUMENT | DATE FILED |
|---|---|---|
| CX 176 | Letter dated December 5, 1996 from Attorney Forbes | 12/05/96 |
| ALJ EX U | Letter dated January 3, 1997 from Attorney Billie Pirner Garde regarding a possible attorney fees lien | 01/06/97 |
| CX 177 | Notice of Taking Deposition | 01/13/97 |

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| RX 146 | Respondent's Motion for Clarification | 01/14/97* |
| ALJ EX V | Order of Clarification | 01/16/97 |
| ALJ EX W | Order Designating New Hearing Site | 01/16/97 |
| RX 147 | Respondent's Notice of Filing | 01/21/97 |
| CX | Complainant's Supplemental Exhibit List; Complainant's Answer to | 01/21/97 |

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|---|---|---|
| 178 | Respondent's Motion for Clarification; Complainant's Amended Witness List | |
| CX 179 | Complainant's Supplemental Exhibit List | 01/21/97 |
| RX 148 | Letter from Attorney Paul C. Heidmann dated January 24, 1997 | 01/24/97 |
| CX 180 | Letter from Attorney Philip H. Forbes dated February 3, 1997 | 02/04/97* |
| ALJ EX X | Notice of Reconvened Hearing | 02/03/97 |
| ALJ EX Y | Memo from Nuclear Regulatory Commission requesting service of documents | 02/06/97* |
| CX 181 | Motion for Withdrawal of Counsel | 02/12/97* |
| ALJ EX Z | Letter from Bayley Reporting, Inc. | 02/14/97 |
| CX 182 | Letter from Complainant dated February 15, 1997 | 02/15/97* |
| CX 183 | Letter from Complainant dated February 13, 1997 with Supplemental Exhibit List and Exhibits enclosed | 02/19/97 |
| RX 149 | Respondent's Answer to Complainant's Motion for Withdrawal of Counsel | 02/19/97 |
| CX 184 | Letter from Complainant dated February 13, 1997 | 02/20/97 |
| CX 185 | Letter from Complainant dated February 17, 1997 with Supplemental Exhibit List enclosed | 02/20/97 |
| ALJ EX AA | Order | 02/28/97 |

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| CX 186 | Complainant's Brief on Order dated February 28, 1997 | 03/08/97* |
| CX 187 | Complainant's Notice of Filing | 03/10/97 |
| RX 150 | Respondent's Brief in Response to Order of Administrative Law Judge | 03/10/97* |
| ALJ EX BB | Order | 03/12/97 |
| RX 151 | Respondent's Motion for Reconsideration | 03/13/97* |
| CX 188 | Complainant's Motion for Order Modification | 03/13/97* |
| ALJ EX CC | Order | 03/14/97 |

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| CX 189 | Complainant's Motion for Reconsideration | 03/18/97 |
| CX 190 | Affidavit of Complainant | 03/18/97 |
| CX 191 | Complainant's Notice of Filing | 03/20/97* |
| ALJ EX DD | Order Regarding Post-Hearing Briefs | 03/25/97 |
| RX 152 | Notice Regarding Service of Briefs | 03/28/97 |
| RX 153 | Respondent's Notice Regarding Complainant's Motion for Reconsideration | 03/31/97* |
| RX 154 | Errata Sheet | 04/04/97 |
| ALJ EX EE | Letter and Attorney Fees submitted by Attorney David K. Colapinto | 04/08/97* |
| ALJ EX FF | Letter from the Office of Administrative Law Judges to Attorney Colapinto | 04/09/97 |
| CX 192 | Complainant's Post-Hearing Brief on Remand | 04/23/97 |
| RX 155 | Respondent's Proposed Recommended Supplemental Decision and Order on Remand | 04/23/97 |
| CX 193 | Letter from Complainant | 04/28/97 |

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| CX 194 | Complainant's Demand and Itemization for Damages | 05/12/97 |
| CX 195 | Complainant's Notice of Filing | 05/13/97 |
| RX 156 | Respondent's Motion for Extension of Time | 05/19/97* |
| ALJ EX GG | Order Granting Respondent's Motion for Extension of Time | 05/20/97 |
| RX 157 | Respondent's Memorandum Opposing Complainant's Damages Brief | 06/02/97 |
| CX 196 | Complainant's Motion for Expedited Decision | 07/08/97 |
| ALJ EX HH | Order Regarding Complainant's Motion For an Expedited Decision | 07/23/97 |
| RX 158 | Respondent's Notice of Supplemental Authority | 08/19/97 |
| CX 197 | Complainant's Notice of Supplemental Authority | 08/28/97 |

The record was closed on August 28, 1997 as no further pleadings were filed.

## I. Scope of the Remand Mandate

On the first day of hearing, Respondent renewed its Motion **in Limine** to narrow the scope of the remand proceeding (RX S), and a lengthy discussion concerning the scope of the impending hearing ensued. (RT[3] 29-92) The parties are of polarized opinion. On the one hand, Respondent argues

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that this Administrative Law Judge should restrict the evidence to be admitted on remand to an inquiry as to the allegedly discriminating actor's motive in discharging Complainant and Complainant's rebuttal of that evidence. On the other hand, Complainant argues that he must present a broad array of evidence, including that evidence which he believes evidences a hostile work environment, escalation of hostility, and the impact of this environment on Complainant's state of mind at the time of the subject incidents, to rebut Respondent's showing that it would have taken the adverse action against the employee for the legitimate reason alone.

At the center of this controversy, is the Secretary's June 3, 1994, Decision and Remand Order (ALJ EX B), which is complimented by a February 16, 1995 Order (ALJ EX D) issued in response to Respondent's Motion for Reconsideration. The Decision and Remand Order remanded this case "to the ALJ to review the record and submit a new recommendation on whether Saporito would have been fired for legitimate reasons even if he had not engaged in protected activity." (ALJ EX B at p. 2) The Secretary reviewed the record and agreed with the ALJ that "the allegations of retaliatory discipline and harassment raised in Case No. 89-ERA-7 were not 'causally related to [motivated by] [Saporito's] protected activity.'" **Id.** at 2. The Secretary did not agree, however, that the reasons given by Florida Power & Light Company (hereinafter FP&L) for Complainant's discharge were valid in the circumstances. **Id.** Accordingly, the Secretary ordered Case No. 89-ERA-17 be "remanded to the ALJ to review the record in light of this decision and submit a new recommendation to me on whether FP&L would have discharged Saporito for the unprotected aspects of his conduct in these incidents." **Id.** at 7.

This Judge is bound by the Secretary's holding that Complainant established his **prima facie** claim for violation of the ERA in Case No. 89-ERA-17. The Secretary expressly stated "I find that FP&L violated the ERA when it later discharged Saporito, among other reasons, for refusing to obey Odom's order to reveal his safety concerns." (ALJ EX B) In reaching his decision, the Secretary specifically found the Respondent's rationale for requiring Complainant to reveal his safety concerns to the Site Vice-President to be "disingenuous."

The February 16, 1995 Order states, in relevant part,

> It is important to note that the June 3 order did not decide the ultimate question regarding the appropriate outcome of the dual motive analysis to the facts of this case. On remand, FP&L will have an opportunity to show it would have discharged Complainant, even if he had not insisted on his right to speak first to the NRC, for other legitimate reasons. This is not a direction to the ALJ to second guess FP&L's management decisions. He should examine only whether, absent Saporito's expressed intent to contact the NRC, FP&L ordinarily would have fired him for failing to reveal these concerns or for other reasons, as it would any other employee. (ALJ EX D, Order, at p. 4 and n.2)

Respondent argues that the Secretary's remand mandate narrowly instructs this Administrative Law Judge to apply the dual motive analysis and determine only whether, absent Complainant's expressed intent to contact the NRC, Respondent ordinarily would have fired him for failing to reveal these concerns or for another reason as it would any other employee. In this regard, Respondent suggests it is not necessary for Complainant to re-introduce the lengthy testimony concerning the underlying facts. As Respondent would have it, this ALJ need only listen to the testimony of witness Odom, Respondent's Site Vice-President at the relevant time, and render a credibility determination as to whether Mr. Odom would have terminated Complainant regardless of Complainant's engagement in protected activity.

Every remand mandate should be strictly followed within the confines of the mandate order. **Tritt v. Fluor Constructors, Inc.**, 88-ERA-29 (ALJ August 29, 1994). Where, however, the mandate remands the case with directions to accomplish a certain act, but without indicating how the act shall be performed, there exists a large measure of discretion in the performance of that act. **Id.** This Administrative Law Judge has received a mandate from the Secretary to apply the dual motive analysis to the facts of this case. Precisely how that mandate is to be accomplished is somewhat ambiguous.[4] This Administrative Law Judge construes the Secretary's Decision and Remand Order to leave me with wide latitude in the accomplishment of the task at hand.

Respondent's argument might have been more persuasive if presented to the Administrative Law Judge who presided over the initial hearing. This case is complicated, however, by the necessary reassignment of this matter on remand. (ALJ EX E; H; I)

Once a complainant has established his **prima facie** claim, a respondent must respond by producing evidence that the adverse action was motivated by legitimate, nondiscriminatory reasons. At this point, the rebuttable presumption created by complainant's **prima facie** showing drops from the case and the complainant bears the burden of proving, by a preponderance of evidence, that he was retaliated against in violation of the law. If complainant establishes such, the respondent then has the burden of proving, also by a preponderance of evidence,[5] that it would have taken the adverse action against the employee for the legitimate reason alone. **See Generally Carroll v. Bechtel Power Corp.**, 91-ERA-46 (Sec'y 2/15/95), **aff'd**, **Carroll v. U.S. Dept. of Labor**, 78 F.3d 352 (8th Cir. 1996), **reh'g denied**, 1996 U.S. App. LEXIS 10441. **See Generally Yule v. Burns Int'l Sec. Serv.**, 93-ERA-12 (Sec'y 5/24/95) (discussing the burden of proof in a dual motive analysis and the differing standards applied pre- and post-1992).

With these burdens in mind, it is important to note the rules of evidence that apply in the context of an administrative proceeding. In retaliatory intent cases that are based on circumstantial evidence, as here, fair adjudication of the complaint "requires full

presentation of a broad range of evidence that may prove, or disprove, retaliatory animus and its contribution to

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the adverse action taken." **Seater v. Southern California Edison Co.**, 95-ERA-13, at p. 4 (ARB 9/27/96) **(citing Timmons v. Mattingly Testing Servs.**, Case No. 95-ERA-40, (ARB 6/21/96) (footnote omitted). **See Generally**, K.C. Davis, Administrative Law, 2d Ed., Vol. 3, Ch. 16, Evidence (1980)). In the context of whistleblower litigation, Part 24, made applicable to the ERA by 29 C.F.R. Part 24.1(a), provides that the ALJ may exclude relevant evidence that is "immaterial, irrelevant, or unduly repetitious." 29 C.F.R. 24.5(e)(1). The Board has thus stated that Part 24.5(e)(1) does not allow for the exclusion of relevant evidence unless it is "unduly repetitious." **Seater**, **supra**, at n. 8. The mandate of this Section is consistent with the nature of the evidence presented in a circumstantial evidence case of retaliatory intent, some of which may appear to be of little probative value until the evidence is considered as a whole. **Id.** (**citing Timmons**, **supra** and cases cited therein.)

As applied to this case, with its peculiar procedural history and specific[6] remand mandate, the burden of proof and evidentiary standard have compelled the determination it was proper for the undersigned to hear a broad array of evidence. Judge Iacobo's credibility determinations and factual findings were found by the Secretary to be insufficient for an application of the dual motive analysis because Judge Iacobo found, in the first instance, that Complainant failed to establish a **prima facie** case. In light of this determination, Judge Iacobo did not proceed to a complete evaluation of Respondent's motives, nor did he determine the role each motive played in the ultimate disciplinary action.

It would be a difficult task, if not an impossible feat, for this Judge to determine whether Respondent would have terminated Complainant regardless of his protected activity on the original record alone. This is a determination deeply seated in an evaluation of the relevant actors' motivation, ulterior or otherwise. This Judge is hardpressed to envision a way of making that determination without rendering credibility findings about the motivations of those persons involved in the November 23, 1988 incident, the November 30 incident, and the order to be examined by the company doctor. Additional factual findings concerning these events are essential to a resolution of Respondent's motivation. Indeed, it is the absence of such findings that led the Ninth Circuit to remand another whistleblower case to the Office of Administrative Law Judges so that the evidence could be properly addressed in the context of the dual motive analysis. **See Mackowiak v. University Nuclear Sys., Inc.**, 735 F.2d 1159, 1164-65 (9th Cir. 1984), **on remand**, 82-ERA-8 (ALJ 7/25/86).

## II. Summary of the Evidence

This Judge will preface his discussion of the three incidents on which Respondent rests Complainant Saporito's termination with a general summary of the atmosphere in which these incidents took place. I will, so to speak, set the stage upon which the particular acts unfold.

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From 1987 through 1988, Turkey Point Nuclear was on the NRC's watch list and was one of the most scrutinized plants in the nation by the NRC, as is evidenced by the imposition of various penalties and violations. (CX 103; CX 118) Indeed, Mr. Odom described the plant as being under a microscope. Complainant summarized that due to examination by the Institute of Nuclear Power Operations (hereinafter INPO) and NRC scrutiny, the Turkey Point work environment was affected and the employees "were, in essence, walking on egg shells." (RT 976)

In or around April of 1988, Mr. Kappes told Mr. Odom that Complainant was on his way to work at Turkey Point. The impending return was the subject of conversation and was regarded as an "event." Complainant had the reputation of being a troublemaker, nit-picker and non-worker. (RT 741, 1870, 1882, 1969-70, 2018, 2025) Although Mr. Odom heard Complainant was a troublemaker, he had not heard that Complainant had filed nuclear safety issues or concerns or had dealt with the NRC. Mr. Odom's perception of Complainant being a "very difficult employee" was confirmed by the incidents regarding two of Complainant's supervisors, a Mr. Koran and a Mr. Boger. (RT 746) Mr. Odom and Mr. Kappes similarly testified that their perception of Complainant as a troublemaker and/or a difficult employee had nothing to do with his Department of Labor (hereinafter DOL) or NRC filings (RT 746, 1970), but was due to Complainant's stopping jobs for nuclear concerns, clearance procedure concerns, and what he claimed were improperly planned jobs. (RT 1207)

In November 1988, Mr. Odom was in possession of and addressed a grievance from Complainant's employment at St. Lucie that indicated Complainant was "clearly a disruptive force" from July 1986 through December 1986. (RT 762-763) Sometime after October 14, 1988, Mr. Odom contacted Mr. Ken Harris, Mr. Odom's counterpart at the St. Lucie plant, who left Mr. Odom with the impression that Complainant was a "work the rule type of person" who seemed to want to avoid work and who did not finish jobs.[7] (RT 350)

Mr. Kappes was of the opinion that Complainant actually harassed management[8] (RT 1869-70, 1880, 1908, 1911-12) and that his letters did no more than clog the system with issues that were not on the forefront of the plant's plate. Despite this, there were a couple of times that Mr. Kappes' reports on Complainant were positive. (RT 375)

Besides this reputation that preceded Complainant, Complainant called in sick the first day he was scheduled to work at Turkey Point. On his second or third day there was an issue about Complainant calling home when he was going to work overtime and, within

the first week, there was a meal ticket issue. During the last week of April and first week of May 1988, there

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were problems on four of Complainant's jobs and performance issues that supervision brought to Complainant's attention. (RT 1214) Complainant then violated a call in sick procedure on May 6. On or about June 28, Mr. Kappes informed Complainant that his work performance at St. Lucie was not very flattering and that this reflected back in Complainant's Plant Work Orders (hereinafter PWOs), which Mr. Kappes was reviewing. Mr. Kappes told Complainant his work was not the quality of someone with seven years experience. Complainant recalls Mr. Kappes telling him if this standard continued, Complainant could be discharged. (RT 1241)

Complainant became a topic of conversation as time went on. (RT 296) All this resulted in Mr. Odom trying to have two job stewards present whenever there was a meeting with Complainant. (RT 373) By November of 1988, Mr. Kappes held the opinion that Complainant was consuming too much of his time and that, generally, Messrs. Odom, Tomaszewski, Harley, Koran and Cross were all of the same opinion. (RT 1918-19)

As of November 15, 1988, Mr. Odom did not recall the term insubordinate being used in reference to Complainant. He recalls, however, border-line behavior and a discussion which occurred somewhere between October 14 and November 23, 1988 that Complainant knew how to push authority, but that he stopped before he crossed the line. Furthermore, Mr. Odom recalls that Complainant had a reputation for being clever, "clever meaning that he would push to the limit any kind of authority over him, often in an insolent way or until he got close to the line, and then he would typically not go over the line." (RT 795)

Respondent stipulates that prior to the discharge of Complainant on December 22, 1988, Mr. Odom had knowledge that Complainant had contacted and was in communication with the NRC. (RT 497) Respondent has stipulated that it received certain letters written by Complainant, either because they were sent directly to Respondent or were copied to it, between the dates of May 9, 1988 and December 28, 1988. (CX 143) The last letters of which Respondent was actually in receipt prior to Complainant's December 22, 1988 discharge were received on December 20, 1988.[9]

Complainant claims Respondent continued to fail to respond to Complainant's safety concerns in June, July and August of 1988. Complainant stated he was not given any feed back up and through September 1988. By September 1988, this was weighing very heavily on his mind and Complainant was very concerned for plant safety. In November 1988, Complainant felt that Respondent was absolutely not responsive to his concerns. Complainant was concerned about a "serious nuclear problem" and the fact that he was raising questions and not receiving any feedback. By November 1988, Complainant had "a zero level confidence" that Respondent would be responsive to any concern that he

might identify. (RT 1042) Complainant was of the opinion that he was working in a hostile environment and that he should communicate strictly with the NRC because, whenever he dealt with Respondent, he was disciplined.

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Complainant, however, admits there were some memos that were responsive to his concerns. (RT 1250) For example, a Quality Control memorandum dated July 19, 1988 (RX 60) responds to two of Complainant's concerns dated June 22, 1988.[10] (RX 55; RX 56) Complainant also remembers being interviewed after sending RX 55 and 56. In addition, Complainant is aware that Mr. Kappes and Mr. Tomaszewski began an immediate investigation into the allegations of Complainant's September 29, 1988 letter concerning the Koran incident. (RX 68) Complainant, indeed, was interviewed about it. (RT 1298)

Complainant testified he expected feedback from everyone he ever "cc'd" on his numerous letters. (RT 1228) Complainant did not, however, copy Mr. Odom on anything other than the INPO letter and the Koran letter prior to November 1988. (RT 1302) Complainant testified that he had a zero level confidence in Mr. Odom resolving his safety concerns, although he also testified that he had never had a personal conversation with Mr. Odom about those concerns prior to November 30, 1988. (RT 1399)

Mr. John Sherwood Odom, Jr., Respondent's Site Vice-President at Turkey Point from September 1987 until April 1989, testified at the hearing on remand. Mr. Odom testified that he was the one who made the decision to terminate Complainant[11] and that his decision was based on three separate acts of insubordination: (1) Complainant's refusal, in spite of a direct order, to tell Mr. Odom his safety concerns; (2) Complainant's refusal to come to a meeting; and, (3) Complainant's refusal to undergo a physical examination. (RX 104) Complainant was informed of his discharge on December 22, 1988 and handed a Report of Discipline specifying the grounds for that decision. (RX 103; RX 104) An examination of these particular incidents which constitute Respondent's grounds for discharge, as well as those incidents immediately preceding and interceding those events, is in order.

Mr. Kappes recalls that at some point, Mr. Odom instructed him to back-off, to handle Complainant gently, to be very polite with him and not to pursue anything without Mr. Odom knowing it. This occurred sometime around late October 1988, the time at which an independent investigation of Complainant's discrimination complaint was set up (RT 1891), or around late September 1988, the time that the Koran letter was sent to the NRC. (RT 1905)

The law firm of Stier, Anderson and Malone was retained by Respondent to act as an independent investigatory body of Complainant's allegations of discrimination and harassment. According to Mr. Odom, he was concerned about the DOL complaint because it was a formal complaint to a government department that was going to result in

an investigation and Respondent had no way of making a determination of what the facts were. Mr. Odom maintains the law firm was not charged with the obligation of looking into Complainant's nuclear safety concerns. Although Mr. Kappes initially stated it was Mr. Odom's intent to have Complainant speak with the investigating firm regarding Complainant's safety concerns (RT 1920), upon cross-examination he stated he is not sure why the firm was called in. (RT 1971) This was Mr. Odom's first time dealing with such a complaint, and he had no idea what protected activity meant. He did, however, know he could not retaliate against someone for going to the DOL or the NRC.

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Mr. Odom recalled that the question of the firm being "independent" was raised in a mid-November meeting and that the union raised the issue that the firm was there to investigate Complainant and not really Complainant's allegations. (CX 87) Indeed, someone referred to the investigation during this meeting as a "witch hunt." (RT 473) Complainant described the tone of the meeting as very argumentative. (RT 1055) Although Mr. Kappes initially stated it was Mr. Odom's intent to have Complainant speak with the investigating firm regarding Complainant's safety concerns (RT 1920), upon cross-examination he states he is not sure why the firm was called in. (RT 1971)

Complainant actually grieved Respondent's hiring the independent law firm to, as Complainant characterizes it, "interrogate" him. (CX 85; RT 1039) Complainant had never before heard of such an investigation. During this interrogation, Complainant felt threatened by these three attorneys, who he contends were hired directly after Complainant filed his safety concerns. Complainant stated the investigators wanted to know his safety concerns, even though they were supposedly hired to investigate the DOL complaint.[12] The investigation also bothered Complainant as it was an interference with his right to an independent investigation. Despite this, Complainant admits to eventually speaking with the attorneys in mid-November concerning his safety concerns. He stated he did so upon the advice of Mr. DeMiranda, who encouraged Complainant to talk to the attorneys about his safety concerns, but not about falsification issues about which Complainant had already spoken to the NRC.

On November 22, 1988 there was a meeting between Complainant and Mr. Wes Bladow, Quality Assurance superintendent, with Mr. Boyle, a union representative, present. The minutes of that meeting (CX 120) indicate that both Mr. Bladow and Mr. Boyle were in agreement that Complainant's safety concerns needed to come out. Mr. Boyle stated that, in his opinion, there was nothing so immediate to Complainant's safety concerns that the health and safety of the public would be affected before 9:00 a.m., the time at which a pre-scheduled meeting was set to begin. Mr. Boyle asked Complainant to confirm this, which Complainant did. The minutes reflect a standoff with Complainant refusing to answer Mr. Bladow's question about his nuclear safety concerns until Mr. Bladow first answered Complainant's questions and Mr. Bladow insisting that Complainant tell Mr. Bladow Complainant's concerns. Mr. Bladow was the first to answer, responding to Complainant's questions about the INPO letter. Complainant then

continued to answer Mr. Bladow's questions with a question, hinting that the INPO letter was one of his concerns and stating that he had spoken with the NRC, Region II, and was preparing a report. Complainant told Mr. Bladow that Mr. Bladow, as well as his whole department, was a nuclear safety concern to Complainant. (RT 1355)

Mr. Odom, upon being informed of Complainant's comment about the health and safety of the public not being affected within the next forty-five minutes, thought it was

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"utterly a most irresponsible, one of the most irresponsible statements" he had ever heard, a very smart alec and frivolous remark. (RT 493, 773) Moreover, Mr. Odom stated this reported conversation confirmed his impression that Complainant may not have had any real safety concerns and that he may simply have been trying to divert attention from his performance problem.

Complainant describes his conversation with Mr. Bladow and explains that he did not answer Mr. Bladow's questions because he was concerned that Mr. Bladow was not independent, as his department was supposed to be. Complainant also contends, however, that he told Mr. Bladow his nuclear safety concerns. Complainant explained that he would tell Mr. Bladow his concerns and yet refuse to tell Mr. Odom his concerns because in his mind Mr. Odom already knew all of those concerns. (RT 1372) Mr. Bladow should have, according to Complainant, told Mr. Odom what Complainant had told Mr. Bladow. It may be noted, however, that while Mr. Odom is ordering Complainant to tell him the concerns on November 23, Complainant never informs Mr. Odom that he told Mr. Bladow his concerns the day before. (RT 1373) In fact, Complainant did not even tell his union representative during the November 23 meeting that he had told Mr. Bladow. (RT 1374)

November 23, 1988 is the first day Mr. Odom and Complainant, together with union representation, sat down to handle Complainant's fifty or so grievances.[13] (CX 94) Complainant was concerned that a lot of them were being resolved with no prejudice, meaning that they would serve as no precedent for other union members. Complainant testified the grievances were resolved as between the union and Respondent. In Complainant's mind set, however, they were not resolved. (RT 1365)

Later in the day on November 23, there was another meeting between Mr. Odom and Complainant, with union representation present. (RX 90) It was during this meeting that Mr. Odom informed Complainant that he had heard second hand that Complainant had some nuclear safety issues. (RT 511, 838, 1924; RX 90) Complainant indicated that he did have some concerns. Mr. Odom then indicated that he was personally responsible for safety at the plant and that he wanted to hear Complainant's concerns. Mr. Odom testified that he asked Complainant "directly...as directly as [he] knew how" to tell him those concerns and that he "got an evasive answer." (RT 588) Mr. Odom "kept pushing." (RT 588)

Complainant continued to refuse to disclose his concerns to Mr. Odom, and finally stated he would only speak with the NRC. (RT 1374, 1925) Mr. Odom then told Complainant that if he would not tell Mr. Odom, he should tell the NRC as soon as possible. Mr. Odom then specifically used the word "direct order." Mr. Odom "very clearly - and as clearly as [he] humanly knew how, told [Complainant] it was a direct order, so that there would not be any doubt in your mind." (RT 513) Complainant agreed to tell the NRC. Notably, the union representative also asked Complainant to reveal his safety concerns and asked Complainant if the concerns affected the safety of the union people. Complainant similarly declined to reveal his concerns to the union. (RX 90)

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Mr. Odom came away from the meeting with the impression that Complainant would tell the NRC his concerns. (RT 517) CX 167 is a November 23, 1988 letter from Complainant to the NRC. Nevertheless, Mr. Odom believes Complainant did not carry out the direct order because while Complainant did contact the NRC, he did not tell them any concerns.

Complainant responded to Mr. Odom's direct order that he contact the NRC by stating that he needed time, as well as materials, in order to provide the concerns. Complainant also stated he was directed by the NRC to get the materials and to do a report and provide that report to the NRC.[14] (RX 88) It was at this point that one of the union representatives present gave Mr. Odom the list, a set of pre-conditions to Complainant communicating with the independent law firm that had been called upon by Respondent to investigate Complainant's allegations of discrimination and harassment. (RT 516) Mr. Odom stated that Complainant's list of demands were "frivolous, a just ridiculous demand" that Mr. Odom had no intention of fulfilling. In this regard, Mr. Odom did not see his failure to give Complainant three highlighters, blue and yellow, or two hundred five by seven index cards or one staple remover tool or an electric pencil sharpener, etc., as an interference with Complainant's right to contact the DOL or the NRC. (RT 771-772) Mr. Odom further viewed this list as an exhibition of Complainant's uncooperative attitude. (RT 104) Mr. Odom also recalls Complainant stating he would not talk to the investigators until his 50 grievances were resolved.

Complainant stated the list was generated at the request of Mr. Kappes and that it listed those items he needed to review the PWOs. Complainant felt everything in there was "reasonable" (RT 1058) and stated that Respondent never provided him with the materials. Complainant stated Respondent's failure to do so was just another "road block" to prevent him from getting the PWOs. (RT 1059) According to Complainant, he needed the supplies to perfect his concerns to the NRC, yet the top of the document is entitled "Conditions to Agree to Address FPL Attorneys."

It was Mr. Odom's understanding that on the 23rd he was giving Complainant a direct order. (RT 584-586) In this regard, Mr. Odom testified that it is usual that he would not use the specific language "this is a direct order" when giving a direct order. (RT 784) He

only used those specific words in that meeting when it came down to making sure Complainant went to the NRC because of the circumstances.

Mr. Kappes also maintained during his testimony that Complainant refused a direct order from Mr. Odom to tell Mr. Odom his safety concerns, saying that Mr. Odom asked Complainant twice for his concerns. (RT 1932) Mr. Kappes testified that he knows what a direct order is from his experience in the navy and that 99% of the time the words "direct order" did not need to be used. (RT 1767, 1972) Mr. Kappes explains that "a request from a superior carries the same weight as a direct order." (RT 1938)

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Complainant stated he did not understand Mr. Odom to have given him a direct order at the meeting. (RT 1068) Complainant calls it a "request" (RT 1068) which Complainant refused by stating he would only communicate his concerns to the NRC. Complainant is of the opinion that Mr. Odom has to say "this is a direct order" if he is giving a direct order. (RT 1378) Complainant is impeached, however, with the original transcript where Complainant testified the words "direct order" did not have to be specifically used. (RT 1378)

Complainant admits that Mr. Odom did, at some point, give Complainant the direct order to tell the NRC his safety concerns at his earliest opportunity. Complainant adds that he did, in fact, contact the NRC as directed. (RT 1069) Complainant stated he thinks he wrote Mr. DeMiranda a letter over the Thanksgiving holiday and stated that he could not get hold of Mr. DeMiranda by telephone. Complainant stated that this effort was kind of "repetitive" because Mr. DeMiranda had been brought up to speed on Complainant's concerns all along.

Mr. Odom testified that he did not discharge, suspend, or issue a report of discipline to Complainant at this time even though he thought Complainant was being insubordinate because he was still concerned about discovering Complainant's specific safety concerns and to raise, in the consciousness of employees, safety over anything else.[15] (RT 106) In this regard, Mr. Odom had no idea whether Complainant's concerns were very serious or very small, and that is why he continued to pursue them like a "bulldog." (RT 650) Mr. Odom did not use the word insubordinate during the meeting on November 23rd because he did not feel he had to, it was so obvious to him that Complainant was being insubordinate. Mr. Odom testified he would not have terminated Complainant for this act of insubordination alone if he had been given Complainant's nuclear safety concerns the next day. (RT 108)

In 1987 and 1988, Mr. Odom encouraged employees to bring nuclear safety concerns to his attention. In 1988, Mr. Odom had his own personal policy that required an employee to bring a safety concern to a supervisor, which policy was communicated to employees throughout 1987 and 1988 at meetings. In fact, on May 24, 1988 Mr. Odom held a Red Barn meeting where he instructed the employees to go to their supervisor if the

procedures were wrong.[16] An employee could even bypass his immediate supervisor and report the concern directly to Mr. Odom or even the NRC without suffering any disciplinary action. (RT 218-219) Mr. Odom was of the opinion that employees who were lower down the chain of command might be less qualified to make a judgement regarding the serious of a nuclear safety concern. Thus, the procedures required immediate reporting to a supervisor even if the concern was not a substantial safety hazard in that employee's mind. The "idea was to take that requirement that you make a determination out of your hands and put it where it could be best made." (RT 650) Mr. Odom felt Complainant might have the competence, in some cases, to determine what a nuclear safety concern was in 1988. In other cases, he might not.

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Mr. Odom, however, is of the opinion that the NRC is "not necessarily" competent enough to determine whether or not a concern has immediate significance depending on which NRC person was handling the concern. Mr. Odom summarizes that the problem with the NRC is its response time to any concern Complainant might have told them. It was not as if Complainant was communicating with the on-site NRC person, who might have a quicker response time. He was communicating with allegation coordinators at a regional office. (RT 781)

Mr. Odom testified that, in his opinion, the rules and regulations in effect in November and December of 1988 required an employee to tell management or supervision about an employee's safety concerns. This is consistent with Mr. Odom's position that Respondent is the one ultimately responsible for safety at the plant. Mr. Odom specifically referred to NRC Form 3 (RX 117) which stated an employee should tell management about safety concerns.[17] In addition to the NRC Form, Mr. Odom stated the Respondent's training program was "full...of requirements, examples, urging that employees should express concerns, things they discover, safety problems" to a supervisor or management, as well as to the NRC if that employee so wished. (RX 127)[18] In addition to this training, there was an administrative procedure at the plant that required individuals to report substantial safety hazards to supervisors. (RX 128)[19]

Complainant maintains that upon arrival at Turkey Point, he was given a tool belt and work orders, no orientation to the plant and no initial training whatsoever. (RT 941) In this regard, Complainant stated RX 127 did not apply to him because it appeared to be something a training instructor would use to narrate a video. Complainant also did not see RX 128, so any language it contains in regards to reporting to the Site Vice-President is irrelevant. It was Complainant's understanding of Form 3 that employees were supposed to work in an environment that encouraged them to report safety concerns, or what they perceived to be safety concerns. This Form also gave Complainant the impression that he could go to the NRC if his concerns were raised to management and not resolved. (RT 952)

On November 23, as Mr. Kappes left work, union representatives approached him and told him they were upset about Complainant's refusal to discuss his safety concerns. They also expressed their concern that Complainant did not have nuclear safety concerns and that he might try to create some. (RT 549-550, 1942) Mr. Odom, upon learning of the union's concerns from Mr. Kappes, instructed Mr. Kappes to restrict Complainant's access to the vital areas of the plant until Respondent proceeded further and had further discussions with the union.[20] Mr. Kappes testified the discussion with the union was factored into the overall decision to reduce access, but access was not reduced *because* of that discussion. (RT 1944)

On Friday, November 25th,[21] Mr. Kappes reduced Complainant's access to sensitive areas based upon the "unprecedented" conversation between himself and union representatives. (RX 91) RX

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91 details the November 25 conversation between Complainant and Mr. Kappes and indicates Mr. Kappes informed Complainant that Complainant's conduct during the November 23rd meeting was hostile and irresponsible toward safety and that if Complainant "refuses a direct order from Mr. Odom, I have no faith or confidence that he will comply any direction or order from any supervisor that works for me." (RX 91; RT 1930) Mr. Kappes indicated the restriction would remain in effect until he was personally satisfied that Complainant "is capable of responding to direction." The restriction, however, was not intended as discipline. (RT 1939)

According to Complainant, he was called into this meeting on the 25th and was "laid into" and "chastised" for refusing a direct order. (RT 1076) (CX 95; RX 91) Complainant testified that he was informed that his site access was being restricted and that he was asked to repeat what he had been told, "as if he were a door." Complainant describes it as a "very demeaning, debilitating exchange."[22] (RT 1077) Complainant was taken aback by the meeting because there was no mention of insubordination during the November 23 meeting, and all of a sudden, two days later, Complainant is being challenged by Mr. Kappes with insubordination. Complainant felt that the more he addressed safety concerns, the more retaliation he would suffer. According to Complainant, the retaliation had escalated because never before had he had his site access restricted, thereby taking away his ability to identify his safety concerns.

On November 28, 1988, there was a grievance meeting (RX 92) and Complainant recalls a discussion about his grievances, with the St. Lucie grievance getting the most attention. Absenteeism was also discussed and Mr. Odom offered to remove the Report of Discipline, but leave the verbal counseling. Complainant refused to agree to that and based this refusal on the fact that he knew he had bona fide illnesses. Complainant stated Mr. Odom then became threatening and told Complainant that in the future his absenteeism would be looked at more seriously. Complainant did not appreciate being "fingered out"[23] and he did not understand why Mr. Odom did not want to see his doctors'

notes. Among other items discussed, Complainant recounts that he and Mr. Odom again discussed withdrawal of Complainant's DOL complaint and Complainant's refusal to do so. Complainant stated Mr. Odom did not like that at all and that Complainant "could tell by [Odom's] demeanor he was upset." (RT 1084) Complainant stated that at the very end of the meeting, Mr. Odom asked Complainant whether he had contacted the NRC and Complainant answered yes.[24]

On November 30th, Complainant started to talk with the investigators about his safety concerns. Upon learning this, Mr. Odom's reaction was "hallelujah" because it meant finally finding out whether or not Complainant's safety concerns were serious. (RT 611)

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Also on this day, Mr. Odom spoke with Messrs. DeMiranda and Jenkins at the NRC.[25] Mr. Odom testified that he was told that Complainant had given the NRC only vague generalities about his safety concerns.[26] Mr. Odom insisted, to no avail, that Mr. DeMiranda inform Mr. Odom of the safety concerns and Mr. Odom ended the conversation with the feeling that the NRC did not have any specifics from Complainant. Messrs. DeMiranda and Jenkins also informed Mr. Odom that they had encouraged Complainant to report safety concerns to his management. (CX 127, plaintiff's exh. 11) The telephone call concluded with Mr. Odom reaffirming his commitment to the NRC that he would make the four years of PWOs, a voluminous amount of paper (RT 525), available to Complainant.

Complainant is aware through the deposition of Mr. DeMiranda that the NRC told Mr. Odom that they had told Complainant to tell Mr. Odom his nuclear safety concerns. (RT 1393) Complainant does not believe he was aware of this back in November 1988.

Mr. Odom then sent for Complainant to come to his office. Mr. Odom did not think there was anything wrong with his trying to get the safety concerns from Complainant because he had been encouraged to do so by Messrs. Jenkins and DeMiranda. (RT 779) Mr. Odom personally scheduled the meeting because it was "the most important thing in his life on this day and at this time." This personal arrangement, according to Mr. Odom, is unusual. Mr. Odom's office was a minute, maybe two minutes at most, from the I&C shop where Complainant worked. Mr. Odom could have physically gone over there, but that would have been unusual and he wanted to stick to the usual procedures associated with the chain of command.

Mr. Odom erroneously assumed Complainant was working until 7:30 p.m. that day. Complainant's shift was actually scheduled to end at 5:30 p.m. Nevertheless, Mr. Odom stated he wanted to see Complainant at 5:30 p.m., regardless of the fact that it was Complainant's regular quitting time, and stated that this was not a holdover situation. Mr. Odom primarily wanted the meeting so that he could make arrangements for Complainant to review the PWOs,[27] per his commitment to the NRC, and because he had seriously begun to doubt whether Complainant knew what a serious nuclear concern was,

particularly one with immediacy to it. (RT 117) Mr. Odom testified he wanted to make sure he and Complainant were on the same "wave-length." Furthermore, Mr. Odom had heard that Complainant had begun to discuss his concerns with the independent investigators and Mr. Odom wanted to know what those concerns were. (RT 112, 118, 611-13, 615, 619) By November 30th, Complainant's concerns were of paramount importance to Mr. Odom, who testified he "thought of not too much else." (RT 620)

Mr. Odom, however, also stated that his reason for the meeting is immaterial. As long as it was for a valid reason, Mr. Odom stated Complainant should have come to the meeting. Regardless of the reason for the meeting, Complainant was absolutely charged with the responsibility of heeding a direct order from his supervisor. (RT 777) There is no immunity for someone cooperating with the DOL or the NRC. A nuclear facility simply cannot operate with that kind of environment. According to Mr. Odom, Complainant's only option was to comply and grieve the direct order.

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Instead, Complainant refused to go and see Mr. Odom. Complainant testified that he left the meeting with the independent investigators sometime between 3:00 and 3:30 p.m. Between that time and 5:15 p.m., when he was originally approached by Mr. Kappes, Complainant met with his union representatives. At approximately 5:00 p.m., Mr. Kappes instructed Mr. Harley to locate Complainant because Mr. Odom wanted to meet with Complainant about Complainant's safety concerns (RT 1946) and Mr. Harley did so. Complainant responded to Mr. Harley by stating that he had not requested a meeting and had no safety issues to discuss. (RT 1947) Complainant further responded that he was not holding over because he had personal family business to which he had to attend. Mr. Harley relayed this information to Mr. Kappes, who then went to the I&C shop himself.

Mr. Kappes approached Complainant in the I&C shop at approximately 5:15 p.m. and, in front of a number of other employees, directed him to stay beyond his normal quitting time for a meeting with Mr. Odom. (RT 948, 1418, 1420, 1950; RX 95) Mr. Kappes testified at hearing that he thought he told Complainant that Mr. Odom wanted to see Complainant about his nuclear safety concerns. (RT 1948-49, 1977). Complainant stated he was leaning against his work bench, that he had been feeling poorly, and described Mr. Kappes as sneaking up on him and startling him. (RT 1481) This sneaking up allegedly precipitated Complainant's chest pains. (RT 1481) Complainant stated he had been experiencing the chest pains for at least three months and that he believed it was from the harassment that he was receiving from Respondent. Complainant stated that his overall health had deteriorated to such a point that by the November 30th encounter with Mr. Kappes, he felt this heartburn sensation.

Initially, Complainant responded he could not stay because he had personal family matters to which he had to attend. (RT 1414, 1419, 1091) Then, upon being informed by Mr. Kappes that he was forcing to Complainant to holdover, Complainant repeatedly stated he was sick.[28] (RT 1419, 1949, 1979-80, 1091) Mr. Kappes described Complainant

as suddenly changing his body language at this claim of being sick and as delivering the statement in a defiant manner. (RT 1949, 1978; RX 95) Mr. Kappes testified that he absolutely did not believe Complainant's statement that he was sick (RT 1979) and stated it was less than a hundred yards to Mr. Odom's office. Furthermore, according to Mr. Kappes, Complainant did not look sick and he was standing there joking and speaking with his fellow employees. (RT 1981) Complainant was advised that he was making a "career decision." (RT 1419, 1950, 1979, 1091) Complainant repeated that he was sick and that he was going home. All parties agree that Complainant was given a direct order on November 30 to meet with Mr. Odom. (RT 1091; 1414)

Mr. Kappes then left the I&C shop, returned with Mr. Harley, and instructed Mr. Harley to escort Complainant off premises as he was suspended for failing to obey a direct order. Mr. Kappes would later document this event as follows: "This individual changed his story

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to a sick excuse in a brazenly obvious manner. He was insubordinate to his superior." (RX 95) Complainant was then escorted out of the plant by Mr. Harley at what Complainant describes as "like one minute to actual quitting time." (RT 1091) Mr. Harley made Complainant stand at the gate for the one minute until it was actually quitting time.

According to Complainant, he did not know where Mr. Odom's office was in relation to the I&C shop. (RT 1092) He admits, however, that he had been in Mr. Odom's conference room at one other time (RT 1402) and that the conference room may very well be right next to Mr. Odom's office. Complainant agreed that he could have physically walked the distance to Mr. Odom's office in perhaps a minute. He explained he did not do this, however, because he was feeling sick and because he had gotten the "heads up" from Mr. Harley that Mr. Odom wanted to see him about his safety concerns. Complainant, however, was not going to be questioned about them again.[29] (RT 1092) "The reason that I gave Mr. Kappes was that I was sick and I was leaving**,** *but in my mind*...I was not going over to meet...Mr. Odom to be asked about my safety concerns again." (RT 1093) Complainant indicated that he feared that if he refused to tell Mr. Odom his safety concerns again, Mr. Odom would probably fire him. He also knew that the wrongdoing issues he had raised with the NRC had been investigated and he did not know if Respondent knew about that yet. Accordingly, on those bases, Complainant "did not agree to meet with Mr. Odom." (RT 1093)

Complainant stated he did not go to the meeting because he was sick[30] and because he did not want to be in the position where Mr. Odom was ordering him to tell him his safety concerns and because it was an illegal holdover. (RT 1413, 1415, 1427) In comparison, Complainant testified at the original proceeding that he would not holdover because he already had his time ticket filled out and he did not want to write a new one. (RT 1424) According to Complainant, he would not have gone to see Mr. Odom even if he had known it was to get the PWOs because he felt sick.

Notably, Complainant did not ask to go home sick (RT 1407) and he did not ask to get any medical attention at all from anybody at any time prior to his being approached by Messrs. Harley and Kappes.[31] (RT 1408) Complainant made the one and a half (1 ) to two (2) hour ride home. He did not go to see a doctor until the next morning, December 1, 1988, at which time he was seen by Dr. Karen Klapper. The Doctor diagnosed Complainant with severe gastritis and, according to Complainant, told him he was fit to return to work on December 12. (RT 1094) Complainant stated Dr. Klapper did not place any restrictions on his work at the time she released him. (RT 1098)

In Complainant's opinion, it was an impermissible holdover for Mr. Kappes to order him to holdover on November 30 to meet with Mr. Odom. In no instance had he ever learned of the holdover procedure being used to compel an individual to attend a meeting. It is used

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to have an employee complete a job which has already begun, for the purpose of continuity. (RT 1128) Complainant further stated it was his understanding that an employee has the right to refuse an order when it is in violation of the Memorandum of Understanding.

Mr. Odom called the confrontation a "significant event" of insubordination which had never happened before. There was "absolutely" no question that Complainant's actions were insubordinate, which is the "failure to follow a direct, lawful order."[32] (RT 654) Mr. Odom testified there are over one thousand employees under his supervision and when he wanted to see one, they were expected to come to his office. The incident of insubordination occurred in the I&C shop in front of other journeymen and was exacerbated by the fact that Mr. Kappes had to get involved. In addition, Mr. Kappes told Complainant that he was making a career decision and Complainant continued to refuse. Mr. Odom thought Complainant's stated reason was a fabrication because it changed in the course of receiving the order. (RT 788) If Complainant were truly sick, Mr. Odom testified that he would have let him go or made arrangements for him to get treatment. Even if Mr. Odom was aware of Complainant's gastritis on November 30, Mr. Odom testified it still would have been insubordination for Complainant not to come to the meeting. (RT 673)

Immediately following this incident, Mr. Kappes met with Mr. Odom, in the presence of union members, to advise him of what had happened. In fact, Mr. Boyle accused Mr. Odom of setting Complainant up. Mr. Odom was surprised, shocked, and disturbed and stated that he probably got defensive. Complainant was suspended by Mr. Kappes and Mr. Odom "had to back" Mr. Kappes because Complainant had changed his story as to why he could not hold over. (RT 122) Mr. Odom stated order and discipline are truly necessary at FP&L. They are a dischargeable offense. Mr. Odom, however, did not discharge Complainant then. Mr. Odom, still intent on discovering Complainant's specific safety concerns, asked Mr. Kappes to get Complainant back on site and to put the

suspension in abeyance. Mr. Odom testified that he probably would not have put Complainant's suspension in abeyance if Complainant had not had nuclear safety concerns. (RT 673)

On December 1, 1988, Mr. Kappes spoke with Complainant on the telephone. (RX 96) Complainant informed Mr. Kappes that he would be on medical leave until December 12, 1988 for "medical disorders relating to stress."[33] (RX 96) Complainant volunteered to bring in a doctor's note when he returned to work. Complainant stated he would seek union, medical, legal and NRC advice prior to any interviewing and that he wanted a number of PWOs from the last four years from Turkey Point and five years from St. Lucie. (RT 1983; RX 96)

Complainant described the December 1, 1988 telephone conversation between himself and Mr. Kappes and stated Mr. Kappes' main concern was to learn the nuclear safety issues. Mr. Kappes, according to Complainant, did not appear to be too concerned with Complainant's

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health. Mr. Kappes informed Complainant that the suspension was put in abeyance per Mr. Odom's instruction and that Complainant should continue to communicate with the investigators, who could go to Complainant's house. Complainant informed Mr. Kappes he would return to work on December 12 with documentation from his treating physician and that he would be undergoing stress tests. (RT 1136) Complainant also reiterated his request for the PWOs. Complainant stated Mr. Kappes closed the conversation by repeating the reason he called was to get the nuclear safety concerns. Complainant came away from this conversation feeling that his employment was in jeopardy. (RT 1137)

Mr. Odom had become aware that Complainant was treating his gastritis with a medication[34] and was of the opinion that Complainant had to see a doctor to determine whether Complainant was truly sick when he refused to holdover and whether Complainant was fit to return to work. Mr. Odom admitted that it is unusual for him to direct an employee to see a company doctor. Mr. Odom also admitted, however, that he did not have a situation where he had ordered an employee to come to his office and was refused under the guise of being too ill. The position of I&C is a critical job, such that an I&C man in a bad state could bring a plant down. Mr. Odom, while Site Vice-President, had not had anyone else in that position with medical disorders related to stress.

And so it was that on December 5, 1988 Mr. Kappes again contacted Complainant by telephone. (RX 98) During this conversation, Complainant was informed of the company's request that he see the company doctor, a Doctor Dolsey. (RT 1142) Towards the end of the call, Complainant stated that the conversation was not helping his stress any.

According to Mr. Odom, he did not rely on a specific procedure in ordering the examination by Dr. Dolsey. It was just "utter common sense." (RT 692) Mr. Odom categorically stated that the order for Complainant to see a doctor had nothing to do with Complainant's safety concerns and that it was not really a fitness for duty issue because fitness for duty is generally used in relation to abnormal behavior usually indicative of alcohol or drugs. (RT 1990) He needed someone to determine that for him. The examination was precipitated by Complainant's failure to come to the meeting under the guise of being sick. Mr. Odom wanted to find out if Complainant really was sick and to determine whether Complainant was well enough to perform his job. In regards to this latter reason, Mr. Odom testified he was aware of people with gastritis who let the physical ailment interfere with their important duties.

Mr. Odom knew, at the time that he determined it necessary for Complainant to go to a company doctor, that Complainant had filed complaints with the NRC and the DOL. According to Mr. Odom, he knew it would not look right if Complainant were discharged. Mr. Odom, however, was of the opinion that he had to balance how that looked against how it would look to allow an employee to disobey orders and evade discipline.

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Prior to December 12, 1988 Mr. Odom met with the union and explained that Complainant would have to see a company doctor before returning to work. (RT 125) This examination, Mr. Odom explained to the union, was being scheduled to resolve the circumstances surrounding Complainant's refusal to hold over on November 30 and his medical disorders relating to stress. (RT 125) Prior to Complainant's return on December 12, Mr. Odom was advised that Complainant had been examined by a doctor, Doctor Klapper. Mr. Odom tried to arrange for Complainant's doctor to speak with the company doctor, Doctor Dolsey. Mr. Odom and the union agreed that should the company doctor reach a different conclusion than the Complainant's doctor, the union and the company would jointly select a third doctor to resolve the dispute. (RT 795-96, 1992) Mr. Kappes considers it favorable treatment that the company offered to get a third doctor tie-breaker. (RT 1992)

Complainant returned to work on December 12 and a meeting was held that afternoon. (RX 99) At the beginning of the meeting, there was a discussion about whether Complainant would allow Mr. Kappes to keep the doctor's note which he had brought in concerning his absence. (RT 1437) During the course of this verbal skirmish, Mr. Kappes informed Complainant that he needed the note, as well as an examination by the company doctor, Dr. Dolsey, to have confirmation that the health and safety of the plant and its employees and surroundings are not affected. (RX 99; CX 96) Mr. Kappes then informed Complainant that he would need to arrange for Dr. Dolsey to be in contact with Dr. Klapper and that Complainant would have to go see Dr. Dolsey. Complainant refused. Complainant was informed that he would not be going to St. Lucie at this time,[35] as he

was supposed to per one of his grievance settlements (RX 94), because of the outstanding restricted access issue which was also being held in abeyance. (RT 1955)

Mr. Kappes testified that he called Dr. Dolsey and gave him the description of an I&C journeyman. Complainant asks why Mr. Kappes could not call Dr. Klapper and give her that information. Mr. Kappes did not do this "because [he is] not empowered to make a decision for discussion on the fitness for duty." (RT 1958) Dr. Dolsey had prior experience with the nuclear plant and Dr. Klapper had none. (RT 1996) To Mr. Kappes' knowledge, Dr. Dolsey knew nothing about Complainant's letters to the NRC, INPO, or the DOL. (RT 1996)

According to Complainant, the meeting left him with the feeling that he was being harassed and discriminated against. In this regard, Complainant testified there was no valid reason for the order, the reasons given were frivolous and there was "no issue of stress" in light of his treating physician's determination that Complainant suffered from severe gastritis. (RT 1144) "There was no reason why the exchange between the two doctors should not have sufficed a determination by Respondent that I was fit for duty." (RT 1145) Complainant stated Mr. Kappes was evasive and would not state the reason that Complainant was being required to see the doctor - he would not classify it as abuse of sick leave or fitness for duty. The meeting concluded with Complainant again asking for the PWOs and Mr. Kappes responding that he would arrange for Complainant to see Dr. Dolsey. Complainant calls this "very suspicious" (RT 1148) and another "bogus" request (RT 1149, 1153) on Respondent's part. Complainant also reiterates his feeling that he knew he was going to get fired.

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Also on December 12, Complainant's name came up on a random drug test list. Random drug testing was required of employees with access to vital areas and those employees had to comply when their name came up. Complainant points out that his access was restricted when his name came up, but Mr. Odom stated there was "no doubt in anybody's mind" that Complainant would end up going back into the vital areas. (RT 700) There was a long period of time within which Complainant could not produce a sample and he was continuously under the observation of a supervisor during that time, which is usual procedure.[36] (RT 1440)

Mr. Odom testified that while Complainant was away from the plant between November 30 and December 12, he had time to think about and reflect on Complainant's behavior, performance or lack thereof, and the events that had transpired. Mr. Odom began to realize, or believe, that Complainant did not have any safety concerns or that he was never going to tell Mr. Odom. Upon Complainant's return on December 12, there was the failure to produce a sample all day for the random drug test and Mr. Odom viewed this as another example of Complainant's insolence.

On December 13, 1988 there was another meeting regarding the intended examination of Complainant. (RX 100) The minutes of that meeting reflect Mr. Kappes informing Complainant that he was being given a "direct order" to see Dr. Dolsey. Furthermore, Mr. Kappes informed Complainant the order was being given to resolve "this issue of sickness of a suspicious nature...and whether you were fit to perform the duties of an I&C Specialist on that day and whether you will be fit to perform the duties of an I&C Specialist in the future." (RX 100) In response to the union's question as to whether this was a fitness for duty issue, Mr. Kappes responded, "This is because of the suspicious sickness rapidly after he was charged with insubordination. Also because it was related to stress..." (RX 100) Mr. Kappes was also clear in stating that the note he had received from Dr. Klapper was not sufficient to address the issue because he, Mr. Kappes, was not able to interpret the note.

Complainant testified that in reaction to this meeting, he found it amazing that Respondent was requiring him in mid-December to see a Doctor to determine whether Complainant was fit to walk from one office to another back on November 30. Complainant thought it was just a "setup," an attempt by Respondent to get Complainant to be insubordinate so that they could fire him. (RT 1154)

There was yet another meeting concerning Dr. Dolsey's intended examination of Complainant on December 14, 1988. (RX 101) During this meeting, Mr. Kappes specifically stated that it had been called to his attention that there may not have been clarity in some of the previous conversations and he made an attempt to rephrase the issue. Mr. Kappes then informed Complainant that the examination was ordered because of Complainant's exhibited insubordination on the night of the 30th, when he changed his statement from one reason to being sick, and on

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December 1st when Complainant told Mr. Kappes that he was being treated for medical disorders related to stress. Mr. Kappes continued to explain that as a licensee, he did not know how to interpret that and that he felt it was serious. Complainant informed Mr. Kappes that he would authorize his physician to speak with Dr. Dolsey, and that he wanted to do this in lieu of being examined by Dr. Dolsey. Mr. Kappes indicated his personal opinion that this was a good idea, and he complimented Complainant on the solution. At the conclusion of the meeting, Complainant made renewed requests for the PWOs and Mr. Kappes again responded by stating he would make the appointment with Dr. Dolsey. (RX 101)

A final pre-examination meeting was held on December 16, 1988. (RX 102) Complainant was informed that the doctors had spoken and that Dr. Dolsey still needed to examine Complainant. Complainant inquired as to why Dr. Dolsey still had to examine him and Kappes stated "He just wants to see you." (RT 1156) *Complainant informed Mr. Kappes that he would see the Doctor because he had been directed by his supervisor to see him.* Complainant stated he would comply and grieve the order. (RT 1997)

Complainant also told Mr. Kappes that he would not authorize Dr. Dolsey to *examine* him and that *he would not authorize release of his medical information.*[37] (RT 1998) Complainant stated he did not "feel it was moral" at that point. (RT 1157) Complainant stated it was his belief that he had the right pursuant to the Memorandum of Understanding, NRC requirements, FP&L's fitness for duty policy and the facts as he knew them on December 16, 1988 to refuse a direct order to be examined by Dr. Dolsey.[38] (RT 1158) According to Complainant, this is the first time Complainant gets a direct order to see Dr. Dolsey. (RX 102) This whole discussion reinforced Complainant's thought that he was going to be fired and that this was a set-up. (RT 1158, 1184) Nevertheless, Complainant went to the Doctor's office because it was a direct order. (RT 1490)

Complainant testified that Mr. Kappes never told him why Dr. Dolsey wanted to see him. According to Complainant, he believed he could have changed his mind on whether to be examined and gone in to have an examination by another doctor up until the point he got fired. (RT 1492) Complainant admits, however, that on December 13, Mr. Kappes told Complainant he had to be examined by Dr. Dolsey to determine if he was bona fide ill on November 30 and whether Complainant was fit for duties. (RT 1440-41)

Mr. Kappes reported to Mr. Odom after the December 16 meeting and stated that he ordered Complainant to go to Doctor Dolsey and that Complainant refused. Mr. Odom, regardless of the safety concerns, now considered Complainant to be a huge disciplinary problem. Much later in the day, Mr. Odom heard from human resources, whose report confirmed that Complainant had carried out his "threat" not to be examined by the doctor. (RT 790) In addition, Mr. Caponi and Mr. Willis came to see Mr. Odom upon their return from seeing the Doctor with Complainant and informed Mr. Odom, as Mr. Odom remembers it, that Complainant would not be examined. Mr. Odom calls this "typical of [Complainant's] behavior pattern." (RT 710)

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Mr. Odom viewed this refusal to see the Doctor as another instance of insubordination, *especially* because the union steward had told Complainant to comply and grieve. Mr. Odom stated this refusal was a dischargeable offense standing alone and Mr. Odom had never had a similar experience of insubordination at FP&L. Mr. Odom was of the opinion, at this time of refusal, that Complainant was out of control and was setting the standard for what he would and would not do. This created a terrible example at a plant that was under a microscope. This act of insubordination also occurred in front of other employees. Accordingly, Mr. Odom had to discharge Complainant for fear that other employees would follow Complainant's lead and think that insubordination was acceptable in certain situations. Indeed, Mr. Odom had been informed by Mr. Kappes that the union stewards had already expressed concern and, in Mr. Odom's mind, *"everybody" was aware of these acts of insubordination and were wondering what management was going to do about it.* (RT 129)

One last meeting, held on December 19, 1988, preceded Complainant's discharge on December 22. (RX 103) This meeting occurs after Complainant had gone to Dr. Dolsey's office. Complainant informed Mr. Kappes that he went to the examination, began to ask the Doctor questions, the Doctor left, then came back and asked Complainant to leave. Complainant informed Mr. Kappes during this meeting that Mr. Caponi eyewitnessed the exchange. In response to Mr. Kappes' question as to whether or not Complainant refused to be examined by the company physician, Complainant responded "No comment." (RX 103) At this point, Mr. Kappes informed Complainant that he was being suspended for refusing to follow a direct order until further notice or until Complainant reconsidered his position on the examination. It was also during this meeting that Mr. Kappes asked Complainant whether he knew why he was directed to see the doctor in the first place. Complainant responded that Mr. Kappes would not take a position on that, that he would not say whether it was fitness for duty or not. Mr. Kappes, again, reiterated the order was issued because of the suspicious nature of the medical disorders on the heels of Complainant's suspension and that the company needed a doctor to evaluate whether or not Complainant could perform his duties at the plant. In concluding, Mr. Kappes stated "I don't see any reason to continue your activities at" Turkey Point "when you wouldn't follow a direct order." (RX 103)

Dr. Dolsey, who was called to testify at the remand proceeding, had little independent recollection of the encounter with Complainant in his office on December 19, 1988. There is, however, a letter admitted into evidence summarizing Dr. Dolsey's recollection of the examination.

Mr. Odom discharged Complainant before receiving the December 20, 1988 letter from Dr. Dolsey to Respondent regarding Complainant's refusal to be examined. (RX 115) The letter was date stamped as received by Respondent on January 18, 1989. Mr. Odom stated he did not need it because he had all the pertinent information from other sources. The letter corroborates that Complainant insisted on asking the Doctor questions prior to being examined. It also indicates Complainant "indignantly" refused to answer the Doctor's questions,

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informed the Doctor that he did not want to be at the Doctor's office, and "very vehemently" refused to be examined. (RX 115) Complainant testified that he was never supplied a copy of this letter (RT 1167) nor the substance of what it said. Complainant, having now seen the letter, does not believe the statements made in that letter by Dr. Dolsey are true and accurate. In fact, Complainant stated that if he had been informed of the substance of the doctor's report, he would have been able to grieve it. (RT 1172)

Mr. Kappes testified that following this meeting, he had absolutely no faith that Complainant was going to follow orders. (RT 2001) In Mr. Kappes' opinion, Complainant would have been discharged for (1) his refusal to hold over and lie about the

reasons therefor and (2) the refusal to be examined by the doctor. (RT 2002) In fact, he would have been discharged for either one.

Complainant thought the examination had to do with his raising safety concerns and that Respondent was looking for another situation where Complainant would be insubordinate so that they could fire him. "The entire circumstances surrounding Mr. Kappes ordering me to see Dr. Dolsey had to do with me raising safety concerns. They were just looking for another reason to fire me..." (RT 1166) Complainant continued to maintain at the remand hearing that there was still no explanation as to why Mr. Kappes wanted Complainant to see Dr. Dolsey. (RT 1166)

Complainant was terminated on December 22, 1988. On that date, he was presented with a Report of Discipline, dated December 21, 1988. (RX 104) The minutes of this meeting (RX 105) indicate that Mr. Kappes was the highest ranking FPL person at that meeting and that the union representatives were allowed no role in the meeting, despite their repeated insistence on meeting with higher management. Complainant recalls Mr. Boyle telling Mr. Kappes that there was no insubordination at the Doctor's office and that the facts were incorrect. (RT 1183)

By December 16, when Complainant refused the direct order to be examined, that was *"the last straw."* (RT 863) Mr. Odom stated, "Having you on the property was a problem, just having you there, with the way you acted and reacted to anybody trying to give you any direction. I couldn't have that around anymore. You had to go." (RT 855) Because of Complainant's insubordination, Mr. Odom could not and would not sanction Complainant's transfer to a non-nuclear site.

Mr. Odom knew, at the time he fired Complainant, that it would bring retaliation charges and that it would look "terrible." (RT 769) Nevertheless, and despite knowing the easier path would be to let Complainant go to St. Lucie as the transfer had been approved, Mr. Odom terminated him because "at that point [Complainant's] behavior and the common knowledge of it and the insubordination and the poor example that set outweighed those other concerns." (RT 769)

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Mr. Odom testified that the question of how he was going to get Complainant's safety concerns was still on his mind when Mr. Odom fired Complainant, but Mr. Odom had basically "given up." (RT 721) It is Mr. Odom's position that the NRC and the DOL complaints had nothing to do with his decision and, if anything, simply prolonged Complainant's discharge. Mr. Odom felt that Complainant would make things up to divert attention from his own poor performance and this is the reason that Mr. Odom wanted to know Complainant's specific safety concerns. In the end, Mr. Odom was of the opinion that the only way he was going to get the concerns was for Complainant to make whatever report he intended on making to the NRC. Mr. Odom testified he "absolutely"

would have found Complainant to have been insubordinate even if Complainant had never filed safety concerns.

Mr. Odom describes it as "critical" that employees at a nuclear plant obey orders. (RT 691) Mr. Kappes agrees that insubordination is serious at a nuclear power plant. (RT 1939) The position of an I&C Specialist is a critical job, such that an I&C man in a bad state of mind could bring a plant down. According to Mr. Kappes, I&C Specialists are the most critical safety persons other than operators. (RT 1991) Complainant has done jobs in the past, even where he thought it was a retaliatory order, because, in his own words, "you have to obey your supervisors...if they tell you to peel paint off a wall,...,you can obey it and grieve it." (RT 1012)

Mr. Caponi stated it is absolutely necessary that orders be followed in a nuclear power plant, especially in the case of an I&C Specialist who has more electronic nature instrumentation. An I&C Specialist could quickly bring down a unit. (RT 1600) Mr. Caponi agrees that a stress disorder is a potentially dangerous thing for an I&C Specialist in 1988 at the nuclear plant.

Mr. Caponi, a gentleman who presented himself as a highly motivated and dedicated individual and who impressed this Judge with his integrity and credibility (RT 1694), is the union representative who accompanied Complainant to Dr. Dolsey's office on December 19, 1988.[39] He recalled some of the facts of Complainant's visit to Dr. Dolsey and, particularly, that the Doctor was not interested in answering Complainant's questions. (RT 1553) Mr. Caponi recalled Dr. Dolsey came back into the room and told Complainant he wanted to examine him, and Complainant asking whom did you call, why did you leave the room. (RT 1611) According to Mr. Caponi, Dr. Dolsey did not tell Complainant to leave. The Doctor stated that he wanted to examine Complainant and Complainant answered no because he had more questions. (RT 1611-12) Then the Doctor left the room again. When he returned the visit was terminated, but Mr. Caponi cannot remember if more questions were asked in the interim. Mr. Caponi does not recall Complainant explicitly refusing to be examined or the Doctor ordering Complainant to get undressed. (RT 1654) Mr. Caponi stated that Complainant never stated it was alright for the Doctor to examine him. (RT 1612) Dr. Dolsey said to Mr. Willis, the supervisor who accompanied Complainant to the Doctor's office, and Mr. Caponi that Complainant refused to be examined. (RT 1613) Mr. Caponi remembers meeting with Mr. Odom after the examination, although he does not recall the substance of their discussion. According to Mr. Caponi, he would have relayed this testimony as presented on remand to Mr. Odom.

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Mr. Caponi has never heard of another FP&L employee who refused to be examined by a doctor. (RT 1613) Mr. Caponi's understanding at the time of the incident, and he had only been with the company at that point two years, was that an employee would comply and grieve the examination. (RT 1583) Mr. Caponi is of the opinion that Complainant

was complying with that order when he went to the Doctor's office. (RT 1584) In Mr. Caponi's opinion, it would be a responsibility of the company to tell the employee why he was being ordered to go to the Doctor. Mr. Caponi stated that if a doctor would not answer questions that were being put to him by the patient, Mr. Caponi does not know why he would stay there and be examined *unless it was a condition of employment or a direct order*.[40] (RT 1589)

Mr. Caponi also recognizes the term holdover meaning job continuity. In Mr. Caponi's opinion, the order for Complainant to holdover for the November 30 meeting was not legal and that Complainant's reaction to the order sounded suspicious. (RT 1569, 1603) He is also of the opinion, however, that a direct order must be followed and later grieved, unless of course it is a safety violation. (RT 1569-1571) In this regard, Mr. Caponi stated he would attend a meeting called at 5:15 if he was off at 5:30, albeit he would bring a job steward with him. (RT 1596-97, 1599) Mr. Caponi does not believe that an employee could legally refuse an order to attend a meeting. (RT 1571) Mr. Caponi stated he would not even think of saying no to going to the meeting with Mr. Odom, having been with the company only two years and having treasured his job. (RT 1637) Even with the safety concerns hypothetical, Mr. Caponi stated he would, personally or as a job steward, go to the meeting and then the on-site inspector. (RT 1638-39) Assuming he was really too sick, Mr. Caponi stated he would see a doctor immediately, locally, and that he would not drive two hours home. (RT 1642-43) Mr. Caponi believes that if an employee refused to follow a direct order, he would be immediately charged with insubordination and disciplined appropriately. (RT 1572-1574)

Mr. Caponi reviewed the minutes of the December 16, 1988 meeting (RX 102) and was of the opinion that, as a job steward, it is not clear whether Complainant was being ordered to see Dr. Dolsey as a fitness for duty issue. (RT 1664-65) Indeed, there is no mention during this meeting by Mr. Kappes of the reasons that Complainant was being ordered to see Dr. Dolsey. **(Cf.** RX 99, minutes of December 12, 1988 meeting; RX 100, minutes of December 13, 1988 meeting; RX 101, minutes of December 14, 1988 meeting)

Mr. Caponi was not aware at the time that Complainant was ordered to see Dr. Dolsey that Complainant had told superiors that he was being treated for medical disorders related to stress. (RT 1605-06) Mr. Caponi is informed of the gist of Mr. Kappes' reasons for sending Complainant to the Doctor, **i.e.** whether Complainant can perform his duties now and in the future, and Mr. Caponi understands those reasons.

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In regards to the exchange between Mr. Kappes and Complainant about seeing Dr. Dolsey, where Complainant maintains Mr. Kappes would not classify it as fitness for duty or not, Mr. Caponi stated it could be a condition of employment or fitness for duty issue. (RT 1656-57) Mr. Caponi again restated *the fitness for duty policy at that time was new and not clear.* (RT 1656) If an employee refused to be examined by a doctor or

submit to a drug test in 1988, he would have the right to refuse and then be suspended one day and possibly fired once "the ramifications iron themselves out." (RT 1667) Nobody was quite sure how to deal with it at the time. (RT 1674) Mr. Caponi stated, however, that a situation where an employee was suspected of lying to their supervisor about being ill and not attending a meeting has nothing to do with fitness for duty as that policy was envisioned in 1988. (RT 1675) Lying is an entirely different issue than fitness for duty. (RT 1691)

## III. Discussion

There is one question, and one question only, presented to this Administrative Law Judge for resolution. To wit, has Respondent met its burden of proving, by a preponderance of the evidence, that it would have taken the same action against Complainant Saporito even if no improper motive existed. **Abu-Hjeli v. Potomac Elec. Power Co.**, 89-WPC-1 (Sec'y 9/24/93) (wherein the Secretary held the respondent established by a preponderance of the evidence that it would have discharged complainant absent his engaging in protected activities). **Cf. Dodd v. Polysar Latex**, 88-SWD-4 (Sec'y 9/22/94) (wherein the Secretary held the respondent failed to prove by a preponderance of the evidence that it would have discharged complainant in the absence of his protected activity).

"'The existence of a good and bad reason for the employer's action requires further inquiry into the role played by each motive.'" **Ashcraft v. University of Cinncinnati**, 83-ERA-7, at p. 10 (Under Sec'y 11/1/84) (**quoting Wright Line, A Division of Wright Line, Inc.**, 1980 CCH NLRB #17, 356 (1980), **aff'd sub. nom.**, **NLRB v. Wright Line**, 662 F.2d 889 (1st Cir. 1981), **cert. denied**, 455 U.S. 989 (1982), approved by the Supreme Court in **NLRB v. Transportation Management Corp.,** 103 S. Ct. 2469 (1983)). The ultimate result depends upon whether this Judge can extricate the bad motive and conclude that Respondent would have nevertheless acted the same. As I endeavor to answer this question, this Judge bears in mind that the respondent bears the risk that the influence of legal and illegal motives cannot be separated. **Sprague v. American Nuclear Resources, Inc.**, 92-ERA-37, at p. 6 (Sec'y 12/1/94).

My answer to this question is a resounding yes. This Judge hereby finds and concludes that Respondent would have taken the same action against Complainant Saporito even if no improper motive existed. **See Generally Mandreger v. Detroit Edison Co.**, 88-ERA-17 (Sec'y 3/30/94) (wherein the Secretary dismissed the complaint, holding that the need to determine complainant's emotional stability justified respondent's actions where there was, on the one hand, one instance in which respondent displayed animus and, on the other hand, overwhelming evidence that complainant's work place behavior was aberrant).

It is the employer's motivation that is under scrutiny. **Passaic Valley Sewerage Com'rs v. Department of Labor**, 992 F.2d 474 (3rd Cir. 1993). The employer should be able to present some objective evidence as to its probable decision in the absence of an impermissible motive. **Price Waterhouse v. Hopkins**, 490 U.S. 228, 252, 109 S. Ct. 1775, 1791 (1989). The legitimate reason must be both sufficient to warrant the employer's action and it must have motivated the employer at the time of the decision. **Id.** It is not enough that the decision was motivated in part by the legitimate reason. The employer instead must show that its legitimate reason, standing alone, would have induced it to make the same decision. **Id.** at 252, 109 S. Ct. at 1792.

In **Yule v. Burns Int'l Sec. Serv.**, 93-ERA-12 (Sec'y 5/24/95), the Secretary concluded that the respondent had proven, by clear and convincing evidence,[41] that it would have discharged complainant for insubordination, even if she had never engaged in protected activities. The Secretary found that respondent unequivocally established that it viewed disobedience of any direct order as an offense meriting discharge. The Secretary was not convinced by the ALJ's reasoning that since complainant was not discharged for a previous incident of insubordination[42] , that she should not have been discharged for the more recent act of insubordination. The Secretary noted the analysis would be "very different" if Complainant had expressed to her supervisor during the incident which constituted the insubordination that she believed the act she was being directed to take constituted a cover up to the NRC. **Yule, supra**, at p. 5, n. 8.

This Judge now turns to the case at hand. Respondent has consistently maintained that it discharged Complainant Saporito for three reasons, all having to do with insubordination. The evidence of record leads this Judge to find and conclude that either of the latter two insubordinate acts by itself would have justified Complainant Saporito's termination. The evidence overwhelmingly compels this result when the two instances of insubordination are considered as a whole. This Judge's conclusion is in accord with the express view of the Secretary of Labor to the effect that once an employee, by his own misconduct, provides the employer with a legitimate reason to fire him, little or no weight should be given to evidence that the discharged employee was preliminarily disciplined in retaliation for engaging in the protected activity. **Dunham v. Brock**, 84-ERA-1 (ALJ 11/30/84) at p.13, **adopted**, (Sec'y 6/21/85), **aff'd**, 794 F.2d 1037 (5th Cir. 1986) (**citing Dartey v. Zack Co. of Chicago**, 82-ERA-2 (Sec'y 4/25/83); **Atchinson v. Brown & Root, Inc.**, 82-ERA-9 (Sec'y 6/10/83)).

This Judge finds that it is not within the realm of my remand mandate to evaluate the motives behind the November 23 incident. The Secretary conclusively held in his Decision and Remand Order that "FP&L violated the ERA when it later discharged Saporito, among other reasons, for refusing to obey Odom's order to reveal his safety concerns." (ALJ EX B, at pp. 3-4) The Secretary found Respondent's stated rationale for the November 23 order to be "disingenuous." (ALJ EX B, at p. 2) The Secretary confirmed his ruling by denying

Respondent's Motion for Reconsideration. (ALJ EX D) (wherein the Secretary opined "I find no basis to reconsider the June 3 decision that disciplining an employee for refusing to reveal safety concerns to management when he is about to report his concerns to the NRC is a violation of the ERA") The Secretary was also careful to note, however, that his holding did not resolve the case. Respondent retained the opportunity to show it would have discharged Complainant based on the November 30 incident and Complainant's refusal to be examined by the company doctor even if he had not insisted on his right to speak first to the NRC. (ALJ EX B, at p. 4) This Judge has fully set forth below those reasons that I conclude Respondent would have terminated Complainant based on these latter two incidents alone even if he had not insisted on his right to speak first to the NRC.

The Secretary found Mr. Odom's testimony at the original proceeding to disingenuous, **i.e.**, the Secretary found Mr. Odom less than candid in explaining that he issued the November 23 order because he was concerned about plant safety. Mr. Odom stated no other reason for the order. **A fortiori**, the dual motive analysis cannot be applied to the November 23 incident itself because the Respondent issued the order for one reason and the Secretary has found that reason to be an improper motivation.

This Judge believes I would be shirking my judicial responsibility if I did not pause to note that the evidence of record leads to the conclusion that Respondent's stated reason for ordering Complainant to reveal safety concerns to Mr. Odom was worthy of credence. This Judge, uninformed of the specific reasons that the Secretary discredited Mr. Odom's testimony[43] , notes that the testimony of Mr. Odom, Mr. Kappes, and Complainant, as well as the deposition transcript of Mr. Oscar DeMiranda of the NRC, supports the conclusion that Mr. Odom reasonably believed in Complainant's obligation to divulge his safety concerns to the licensee, the entity primarily responsible for the safe operation of the nuclear plant. I am careful to note that it should not be possible for a respondent to vitiate its action which violates the ERA by merely arguing that it mistakenly believed its actions were lawful. The inquiry should more properly focus upon whether a respondent committed those actions in retaliation for a complainant having engaged in protected activity. If a respondent can establish that it took particular action based on a reasonable belief as to its safety obligation, it should matter not that the belief subsequently turns out to be legally incorrect because that respondent would have shown that it did not act against complainant in retaliation for his engaging in protected activity.

Such is the case at hand. The November 23 incident was an unprecedented situation at FP&L in 1988. Mr. Odom had *never* had another employee state he had nuclear safety concerns and then refuse to divulge them (RT 783) and Complainant was not aware of any other employee who did such a thing. (TR 1316-17) Furthermore, Complainant's claim that he had a zero level confidence in Mr. Odom resolving his safety concerns is dubious because Complainant testified that he had never had a personal conversation with Mr. Odom about his concerns prior to November 30, 1988 (RT 1399) and because Complainant did not even copy Mr. Odom on anything other than the INPO letter and the Koran letter prior to November 1988.

(RT 1302) In this regard, I will comment that it is a ridiculous expectation that Complainant expected feedback from everyone he ever "cc'd" on his letters given that he copied, on average, ten people. (RX 68; RX 80; RX 81; RX 82; RX 51; RX 93) In fact, one of Complainant's letters was sent to Chairman Mikhail S. Gorbachev in Moscow, U.S.S.R., and was copied to President Bush, "all media sources," and others. (RX 142)

The underpinning for Complainant's refusal to divulge his safety concerns to Mr. Odom was that he had falsification concerns. (RT 1395) Complainant, however, never told Mr. Odom that he did not want to tell Mr. Odom his safety concerns because of the possibility of coverup or falsification. (RT 783) Similarly, Mr. Kappes never heard Complainant indicate that he would not divulge his concerns because he was worried about falsification of documents. (RT 2007-08)

This Judge finds and concludes, however, that even without this November 23 refusal to disclose his safety concerns, Respondent had sufficient, legitimate reasons for terminating Complainant. Complainant refused a direct order on November 30, 1988 when he refused to go to the meeting which was called in Mr. Odom's office. Initially, this Judge notes that there is no filing by Complainant of which Respondent was aware that precipitated this.[44] It is clear from the forthright testimony of Mr. Odom that this meeting was called as a result of the fact that Mr. Odom heard Complainant was now talking about his nuclear safety concerns and Mr. Odom wanted to give Complainant the PWOs, as he had that day reaffirmed that commitment to the NRC. Complainant refused to attend that meeting, setting forth to two of his superiors reasons for that refusal that were dubious, if not outright unbelievable.

On the one hand, we have a Complainant claiming he is too ill to walk one to two minutes to a Site Vice-President's office to determine the nature of the meeting that had been called and/or to simply inform him that he was too ill to attend. On the other hand, this same Complainant stated he did not leave work early to seek medical attention because of something so trivial as he did not want to change his time ticket. Complainant did not go to Mr. Odom and again refuse to disclose his nuclear concerns, even though this is what Mr. Caponi testified he would have done, as Complainant had done during the November 23 meeting and was obviously comfortable with doing. Finally, this Judge finds and concludes that Complainant was insolent to supervisor Harley, by responding that he had not called a meeting. Such a statement, made to management by an underling, is nothing more than mockery of management's role.

The evidence establishes that Mr. Odom cautioned Mr. Kappes to deal delicately with Complainant and that Mr. Kappes was on order to inform Mr. Odom before any action was taken in regards to Complainant. On November 30, Mr. Kappes suspended Complainant without first checking with Mr. Odom. (RT 2040) Mr. Kappes explained that Complainant's insubordination was so heinous, Mr. Kappes acted immediately and

then immediately apprized Mr. Odom. (RT 2042) This Judge views Mr. Kappes' chosen course of action to clearly evidence his

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exasperation in the face of Complainant's insolent and suspicious behavior and I doubt that Mr. Kappes was thinking about anything other than the insubordination with which he was presently being confronted on that occasion.

Complainant Saporito was not, as Respondent has suggested, required to comply and grieve the order. The refusal did not involve a work assignment or particular job function or activity; nor was it disorderly or disruptive of the workplace. **Diaz-Robainas v. Florida Power & Light Co.**, 92-ERA-10, at pp. 4-5 (Sec'y 1/19/96); **Order Denying Motion for Reconsideration**, (Sec'y 4/15/96) at p. 3. In **Diaz-Robainas**, a pretext case, the Secretary held that complainant refused to submit to the order at his own peril.[45] Respondent fired him for his refusal and would have prevailed if complainant failed to prove his claim that *the order was retaliatory* under the ERA. **Id.** at p. 5 (Sec'y 1/19/96). Complainant Diaz-Robainas successfully proved by a preponderance of the evidence that respondent's order was based *solely* on retaliatory animus for his protected activity. **Id.**

In an attempt to evade the consequences of his insubordinate action, Complainant contends that he thought this order to holdover was retaliatory. This Judge remains unpersuaded by this contention. Initially, I note that Complainant contends he was informed by both Mr. Harley and Mr. Kappes that Mr. Odom wanted to see Complainant about his safety concerns.[46] Complainant's claim that he thought the holdover to be retaliatory is unreasonable in light of two facts. First, it is not controverted by either party that Complainant did not ask any questions of either Mr. Harley or Mr. Kappes, nor of Mr. Odom for that matter, as to what was meant by Mr. Odom wanting to see him about safety concerns. It is reasonable to construe this statement by Mr. Harley and/or Mr. Kappes, if indeed it was made, in two different ways. One, Mr. Odom could be calling upon Complainant in order to attempt to elicit Complainant's safety concerns from him. Two, Mr. Odom could be calling on Complainant to deliver the PWOs to Complainant. Complainant, however, never found out what was intended by Mr. Odom because he refused to go see him. Complainant deprived Mr. Odom of this opportunity, as he also deprived Mr. Odom of the opportunity of allowing Complainant to go home based on his alleged illness.

Second, Complainant never vocalized to Mr. Harley, Mr. Kappes and/or Mr. Odom the fact that, in his mind, this order was retaliatory. In this regard, **see Yule, supra**, at p. 5, n. 8, wherein the Secretary noted the analysis would be "very different" if the complainant had expressed to her supervisor her belief that the act she was ordered to perform was against NRC regulation. In Complainant Saporito's case, he responded to the direct order with shifting excuses in an attempt to justify his refusal to go to the meeting. This Judge finds and concludes that Complainant blatantly lied to supervisor Kappes on that occasion.

Furthermore, a discharge is not automatically invalid because it was provoked by and inextricable from an improperly motivated adverse employment action, such as a disciplinary

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proceeding, merely because it transpired during that event. **Dunham**, **supra,** 794 F.2d at p. 1041. This position is contrary to the fact-finder's accepted role of weighing evidence and determining whether a particular employee response to improper employer provocation is justified.

Even assuming Complainant had a reasonable basis for believing that the order to holdover was retaliatory, a contention which I have specifically rejected, an otherwise protected "provoked employee" is not automatically absolved from abusing his status and overstepping the defensible bounds of conduct. **Dunham**, **supra**, 794 F.2d at 1041 (Citations Omitted). **See Generally Logan v. U.P.S.**, 96-STA-2, at n. 3 (ARB 12/19/96). This Judge recognizes that the Secretary has held that it is normal for employees engaging in protected activities to exhibit impulsive behavior and that such employees may not be disciplined for insubordination so long as their behavior is lawful and their conduct is not indefensible in its context. **Sprague**, **supra**, at p. 5. Where the alleged misconduct is nothing more than the result and manifestation of the protected activity, the conduct does not remove the complainant from statutory protection. **Id.** In this case, however, the purpose of the meeting becomes irrelevant at that point where Complainant exceeded the bounds of protected conduct and *blatantly lied* as to his reason for not following that order.

In this respect, this case is similar to **Dunham v. Brock**, **supra**. The ultimate question in **Dunham** was whether respondent had proven by a fair preponderance of the evidence that even in the absence of the protected activity, complainant would have been discharged for insubordination in the broader sense of defiance of authority.[47] All complainant had to do was avoid any act or omission that would provide respondent with a legitimate reason to fire him. In **Dunham**, the complainant openly and vigorously defied the authority of management by, in effect, telling management to take his job and shove it. The Administrative Law Judge, who was ultimately affirmed by the Fifth Circuit, held the ERA does not require an employer to take that kind of abuse from an employee. (ALJ 11/30/84) at p. 13, **adopted**, (Secretary 6/21/85), **aff'd**, 794 F.2d 1037. This Judge finds and concludes that the ERA does not require Respondent to take that kind of abuse doled out by Complainant Saporito during this November 30 incident.

My determination that Respondent has met its burden is substantiated by evidence that the repercussion suffered by Complainant as a result of his insubordination premised upon this lie was not unusual. It must be noted that Complainant was not terminated after this instance of insubordination, he was initially suspended. There is evidence in the record which establishes how two other employees were dealt with when suspected of lying to their supervisors. (RX 110) One gentleman, Mr. J.M. Maggard, was ordered to

provide a doctor's note as evidence of any illness resulting in an absence for which he expected to be paid. Another gentleman, Mr. Horace Patterson, was suspended, reprimanded, and demoted as a result of excessive unsubstantiated absenteeism and lying about jury duty. Based upon this evidence, this Judge cannot find that Complainant's discipline was disparate.

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Complainant attempts to show that he was the subject of disparate treatment as compared to Messrs. Koran and Boger. The circumstances are simply too distinguishable to provide any meaningful comparison. Assuming, however, that the incidents involving Messrs. Koran and Boger could be used for comparison, this Judge finds that Mr. Koran was similarly treated. It is a fact that Mr. Koran underwent a drug test, which came back negative. Admittedly, Mr. Boger was never sent to see a doctor. Mr. Odom convincingly explained that this decision was made because an investigation revealed Mr. Boger did not present a fitness for duty problem. (RT 359)

Complainant's lie about being too sick to holdover for the November 30 meeting, as well as Complainant's statement about stress related medical disorders which led to a two week excused absence from work, precipitated Respondent's instruction for Complainant to see Dr. Dolsey, the company doctor. In this regard, this Judge finds and concludes that Respondent clearly articulated to Complainant those reasons it was requiring this examination. The reasons were related to the union by Mr. Odom on December 12, 1988[48] ; to Complainant by Mr. Kappes later on that same day (RX 99); to Complainant by Mr. Kappes on December 13, 1988 (RX 100); and to Complainant by Mr. Kappes on December 14, 1988 (RX 101). It is important to note the evidence from the original hearing that another employee who suffered an anxiety attack was required to see a company doctor as soon as Respondent learned that his illness was anxiety related. (TR 1583-1584)

The minutes of the aforementioned meetings provide indisputable proof that Complainant was informed of valid reasons for the examination. This Judge found Complainant's testimony in this regard to be self-contradictory and, therefore, not credible. Complainant's credibility at hearing was seriously undermined by his self-contradictory testimony, which is evidenced by the number of different times he was impeached with the original hearing transcript and/or his deposition transcript[49] ; by his, at times, incredulous explanations for the difference in his testimony[50] ; and by his repeated evasiveness[51] , which was highlighted by his "vivid recollection" of facts favorable to his case and inability to remember those facts which militate against him.[52] Complainant also repeatedly yawned during cross-examination, at one point he pointed at his son to nudge Attorney Forbes who Complainant claimed looked like he was dozing off.

On the one hand, Complainant repeatedly maintained that he was never informed of the reason that the examination was being ordered.[53] On the other hand, Complainant

admitted that Mr. Kappes informed him on December 13, 1988 that he had to be examined to determine if Complainant was bona fide ill on November 30 and whether Complainant was fit for duties. (RT 1440-41) The Secretary has found that the inherent danger in a nuclear power plant justifies a respondent's concerns with the emotional stability of the employees who work there.

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**Mandreger**, **supra**, at p. 10 (**citing Rose v. Secretary of Labor**, 800 F.2d 563, 565 (6th Cir. 1986) (nuclear power is "one of the most dangerous technologies mankind has invented"). Respondent conveyed to Complainant reasons for the examination that clearly had to do with plant safety, and this Judge does not find it fatal that it was unable to clearly classify the order as a fitness for duty issue.

The foregoing leads this Judge to note that it is apparent that Complainant Saporito's real bone of contention is that Mr. Kappes would not classify the examination as a fitness for duty issue.[54] The evidence, indeed, validates that Mr. Kappes would not do this. It is also a fact, however, that the fitness for duty policy was new at the time and, even more important, was unclear. Both Respondent and the union were struggling to define the parameters of that program in late 1988. I find and conclude that the newness of the policy and the lack of clarity engendered by this newness resulted in Mr. Kappes' inability to clearly classify the order for Complainant to be examined as a, quote-unquote, fitness for duty issue. In this regard, I note the testimony of Mr. Caponi that a situation where a person was suspected of lying to their supervisor about being ill and not attending a meeting has nothing to do with fitness for duty as that policy was envisioned in 1988. (RT 1675) Lying is an entirely different issue than fitness for duty. (RT 1691)

Complainant argues that the important point is not what happened in Dr. Dolsey's office, but why Complainant was sent there. (RT 1545) To some extent, this is true.[55] This Judge finds and concludes, however, that those reasons given by Mr. Odom to the union on December 12; to Complainant by Mr. Kappes on December 12, 13 and 14; and cited in the Report of Discipline prepared on December 21, 1988 constitute valid reasons for which Complainant was ordered to see Dr. Dolsey. Respondent rested its order on clearly enunciated reasons commissioned not only by Complainant's conduct in dealing with his superiors on November 30, but also with knowledge of the union's concerns that Complainant might likely create safety concerns in order to substantiate his safety concern allegations. **Cf. Diaz-Robainas**, **supra** (wherein the testimony of co-workers was that complainant was not considered a threat to the plant). It is clear from a preponderance of the evidence that this order would have been given even in the absence of any illegitimate motive.

Complainant's attempt to align his situation to that of Mr. Caponi is simply unpersuasive. During Mr. Caponi's testimony, he recounted an incident where he became ill with a serious condition known as pericarditis, for which he had to take medication. (RT 1632) Mr. Caponi was told to leave work because he looked ill. (RT 1672) This is

where Complainant's case is significantly distinguishable from that of Mr. Caponi: there was no suspicion as to whether or not Mr. Caponi was truly ill. Therefor, Mr. Caponi was not ordered to see a company doctor. Furthermore, Mr. Caponi's treating physicians knew the type of work he did and did not indicate to the company that Mr. Caponi's condition was stress related. (RT 1672)

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Besides Complainant's specific arguments attempting to vitiate the particular incidents individually, Complainant advanced a general rebuttal. The questions posed at hearing by Complainant as he appeared **pro se**, as well as the argument in Complainant's post-hearing brief, make it evident that Complainant argues that the incidents which gave rise to Complainant's discharge would not have occurred if he had never expressed safety concerns.[56] Complainant argues that he should prevail based on the fact that all of the three incidents relied upon by Respondent in its discharge of Complainant would not have happened but for his protected activity.[57] Indeed, Complainant was successful in obtaining a general agreement from Mr. Odom that he cannot disassociate his request for Complainant to come to his office from Complainant's safety concerns. (RT 673-676)

The link that Complainant asks me to establish is too tenuous to warrant a finding that Respondent violated the ERA. This is not a case where the order which was issued and disobeyed is so clearly intertwined with Complainant's protected activity that the two cannot be extricated. **Cf. Diaz-Robainas**, **supra**, at p. 11 (concluding that even if the Secretary assumed this was a mixed motive case, respondent would not have ordered the evaluation and the insubordination would not have occurred but for complainant's protected activity).[58]

Similarly, this Judge cannot credit Complainant's contention that Respondent orchestrated this grand scheme to lure Complainant into a role of insubordination in order to terminate him. **See Generally Dunham**, **supra**, at p. 13. There is simply no evidence in the record to support this allegation. It is a fact that Respondent gave Complainant a number of direct orders, each of which he chose to refuse to follow. Complainant's refusal, however, did not make it incumbent upon Respondent to stop giving Complainant direct orders, so long as the orders were not in violation of the ERA.

The record does not establish that Respondent engaged in a pattern of retaliatory actions aimed at silencing Complainant's protected activity. In this respect, I particularly note the Secretary's Final Order in 89-ERA-07. Furthermore, there were a number of opportunities for Respondent to harass Complainant, and yet none of these were taken. Indeed, there is evidence that Respondent made a conscious effort to act even-handedly in its dealings with Complainant and, in fact, took the extra precaution of handling Complainant with the proverbial "kid gloves." For example, Mr. Kappes agreed to remove a Report of Discipline for abuse of sick time pending receipt of the doctor's note; he delayed Complainant's Report of Discipline for sick abuse until Complainant had time to review the requested PWOs; he never reinstated an ROD for the meal ticket even

though he mistakenly dropped the issue because he thought the union had already resolved it; and Mr. Tomaszewski downgraded a written warning to verbal counseling for the issue of calling in for two sick days at one time. Indeed, on December 14, 1988, Mr. Kappes, rather than becoming agitated or exasperated at Complainant's refusal to submit to an examination, actually complimented Complainant on the alternative idea of having Dr. Dolsey speak with Dr. Klapper in lieu of examining Complainant. (RX 101)

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Even if this Judge were to generously assume that Respondent knew or should have known that Complainant would refuse to divulge his safety concerns on November 30 based on the December 23 meeting, this does not justify the assumption that Respondent knew or should have known that Complainant would refuse to report to a meeting called by and with the Site Vice-President, Mr. Odom. Similarly, Respondent did not know Complainant would claim stress related medical disorders during the December 5 telephone call or that the telephone call between Dr. Dolsey and Dr. Klapper would not work out or that Complainant would refuse to be examined.

Not only is the record devoid of evidence to support Complainant's allegation that Respondent had a grand scheme to lure him into insubordination, the evidence specifically contradicts Complainant's assertion. It is undisputed that Complainant had been awarded his desired transfer to the St. Lucie plant in settlement of one of his grievances. The transfer was supposed to occur on December 12, and was delayed only because of the unanticipated November 30 insubordination issue, which subsequently occasioned a justifiable inquiry into Complainant's health. Mr. Odom stated, and this Judge finds that statement to be supported by the evidence, that he would not have gone through the effort of settling Complainant's grievance by arranging this transfer if he simply wanted to set-up and/or terminate Complainant.

It is also undisputed that Respondent made an attempt to resolve the issues surrounding Complainant's failure to go to the meeting with Mr. Odom on November 30 and his stress-related medical disorders by arranging a telephone call between Dr. Dolsey and Dr. Klapper. Respondent was not obligated to attempt a resolution of the matter in this manner, and I find its attempt to do so to have been done in good faith. Similarly, Respondent was not obligated to reach an agreement with the union for a third Doctor tie-breaker. Again, the reasonable inference to be drawn from this offer is one of good faith.

The particular circumstances of this case beget the following question in regards to Complainant's claim that he was set-up: Is it enough that Respondent may have had the suspicion that Complainant would be insubordinate to its direct orders based on Complainant's typical insolent behavior and his reputation of which Respondent was undeniably aware? This Judge thinks not. As I have previously held, Respondent was under no obligation to make exception for whatever acts Complainant chose to commit under the guise of being a protected employee. It is indisputable that as such, Complainant was entitled to some leeway in his conduct. He was not, however, entitled

to handle himself in whatever way he chose or to escape Respondent's orders legitimately related to its conduct of business. Therefore, this Judge does not find Complainant's allegation that he was set-up to be supported by the evidence of record, which establishes nothing more than that Respondent issued reasonable direct orders in response to the facts as developed by Complainant's conduct and was met by unreasonable refusal to comply.

In light of Complainant Saporito's repetitive and unprecedented insubordination, it appears that management made the decision to terminate Complainant, a decision which the evidence indicates was applied reasonably. This Judge will not second-guess

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management's decision in this case, as the Secretary has specifically warned me against doing. (ALJ EX D, (Sec'y 2/16/95) at n. 2) Furthermore, the fact that Respondent did not act precipatively is further indication that the decision was motivated by Complainant's insubordination. **See Generally Ashcraft v. University of Cincinnati**, 83-ERA-7, at p. 11 (Under Sec'y 11/1/84).

I have rested my decision, in the alternative, on a finding that Respondent would have terminated Complainant for any one of the acts of insubordination. Respondent could have discharged Complainant, in this Judge's opinion, after the incident where he refused to holdover and *clearly lied* as to his reasons for refusal. The fact that Respondent had the additional ground of Complainant's refusal to be examined was fortuitous.

At first glance, this may give rise to the question of whether Respondent failed to follow its progressive discipline policy[59] and whether this failure would justify an inference that the illegitimate motive did indeed play a larger role in Respondent's decision. Upon due consideration, this Judge rejects that inference as unreasonable in the circumstances. Any deviation from the technical requirements of the Respondent's disciplinary procedures is not necessarily an indication of an unlawful motivation for the discharge. **See Generally Ashcraft, supra,** at p. 12.

Initially, this Judge questions whether Respondent may be legitimately found to have violated its progressive discipline policy. In this regard, I refer to the testimony of Mr. Caponi, who confirms the policy of progressive discipline and that an employee was first supposed to get a verbal warning and then perhaps a Report of Discipline if necessary. (RT 1567) Finally, there may be a more serious Report of Discipline or even discharge. Mr. Caponi stated that the first level, verbal warning, should be and almost has to be used. (RT 1591) This statement is qualified, however, when Mr. Caponi stated there may be exception when there is direct insubordination. (RT 1591-92) In further regards to discipline, Mr. Caponi stated that discipline should be handled on a case-by-case basis, as that is the most fairest way of dealing with an incident. Consequently, Mr. Caponi stated that one employee may be disciplined more severely than another. (RT 1684-85)

According to Mr. Caponi, the company does not have to discipline everybody equally, although it would be a good practice. (RT 1685)

Based upon this evidence, it is not clear that Respondent's disciplinary action in this case would be in violation of its procedure even if there were only one valid insubordination ground to the termination. It is clear, however, that it was a matter of reasonable discretion as to how to deal with insubordination.

Assuming, **arguendo**, that Respondent was required to apply its progressive discipline policy in the context of these two instances of insubordination, this Judge finds and concludes that there was no deviation from that policy. It is a fact that Complainant was verbally warned of the effect of insubordination, **i.e.**, that it was a career decision, during the shop incident of November 30 and he was suspended for that failure to follow a direct order

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under a guise of being sick.[60] (RX 95) Complainant again failed to follow a direct order on December 16, 1988 when he refused to be examined by Dr. Dolsey and, consequently, he was suspended and ultimately discharged.

There is statistical evidence of record which establishes the repercussions suffered by other employees who failed to follow a direct order.[61] (RX 111) Two employees were terminated for failure to follow a direct order, two were demoted, and eleven were suspended. (RX 111) Seven of the Report of Disciplines resulting in suspension indicate that further insubordination will be dealt with by further discipline or discharge. In light of this evidence, it is not possible to find that Complainant was dealt with disparately.

Mr. Odom stated Complainant's acts of insubordination were different than the hypothetical posed by Complainant, which is supposed to mirror the facts of a situation involving a Mr. Fernandez. Mr. Fernandez received a one week suspension and a demotion, which Mr. Odom stated is "definitely significant discipline." (RT 749) Mr. Odom stated Complainant was given more leeway, "great deferential treatment," because of his nuclear safety concerns. (RT 738) Mr. Odom is not aware of Mr. Fernandez being insubordinate in the weeks following that incident. As is evidenced by Mr. Fernandez's case, Respondent did not have to start with a written warning in progressive discipline. The discipline depends on the offense and Mr. Fernandez's insubordination warranted proceeding directly to suspension and demotion.

## IV. Conclusion

I hereby find and conclude Complainant's repeated insubordination, his reaction to direction if you will, was the general impetus for his termination. There is a narrowly circumscribed point within which the Energy Reorganization Act, an employee protection statute, can go no further in protecting an employee. Complainant Saporito

placed himself squarely within that point by his untruthful refusal to attend a meeting and his unwarranted refusal to be examined by a company doctor. These acts created sufficient justification for Respondent's termination of Complainant and Respondent has proven, by a preponderance of the evidence, that these acts would have led to Complainant's termination even if he had not insisted on his right to speak directly with the NRC. Accordingly, this Judge hereby **RECOMMENDS** that the foregoing complaint be **DENIED**.

**DAVID W. DI NARDI**
**Administrative Law Judge**

Boston, Massachusetts
DWD:jw

**NOTICE**: This Recommended Decision and Order and the administrative file in this matter will be forwarded for review to the Administrative Review Board, U.S. Department of Labor, Frances Perkins Building, Room S-4309, 200 Constitution Avenue, N.W., Washington D.C. 20210. The Administrative Review Board is the authority vested with the responsibility of rendering a final decision in this matter in accordance with 29 C.F.R. Part 24.6, pursuant to Secretary's Order 2-96, 61 Federal Register 19978 (May 3, 1996).

**[ENDNOTES]**

[1]Attorney Forbes represented Complainant through February 12, 1997. Subsequent to that date, Complainant appeared **pro se**.

[2]An asterisk next to a filing date is meant to indicate the document was filed by facsimile and the original copy may be date stamped as received on a later date.

[3]"RT" is a reference to the remand transcript. "TR" is a reference to the original transcript.

[4]Clearly, the Secretary is well aware of how to frame a narrowly tailored remand mandate when he or she contemplates specific evidence to be considered or introduced on remand. For example, **see English v. General Elec. Co.**, 85-ERA-2 (ALJ 6/11/86) (in which the ALJ contemplated the Secretary's specific remand mandate which clearly defined the *limited purpose* of the remand, that of taking further *specified testimony* from *identified individuals*). The result of an Administrative Law Judge overstepping the scope of a remand mandate would be for the Secretary to decline to adopt that extraneous part of the recommended decision and order. **See Generally Smith v. Littenberg**, 92-ERA-52, at p. 3 (Sec'y 9/6/95).

[5]The Amendments to the ERA contained in the National Energy Policy Act of 1992, Pub. L. No. 102-486, 106 Stat. 2776 (Oct. 24, 1992), do not apply to this case in which the last complaint, consolidated into Case No. 89-ERA-17, was filed on December 23, 1988.

Recommended Decision and Order Denying Complaint (ALJ June 30, 1989). **See Carroll v. Bechtel Power Corp.**, 91-ERA-46 at n.1 (Sec'y February 15, 1995). **See Also Sprague v. American Nuclear Resources, Inc.**, 92-ERA-37 (Sec'y 12/1/94) (applying the preponderance of the evidence standard to complaint filed in April 1992); **Rainey v. Wayne State Univ.**, 89-ERA-48 (Sec'y 4/21/94) (applying preponderance of the evidence standard to complaint filed in July 1989). **Cf. Yule v. Burns Int'l Sec. Serv.**, 93-ERA-12 (Sec'y 5/24/95) (applying the clear and convincing evidence standard to complaint filed after the date of signing of the amendments, which is the date the amendments became effective).

[6]The remand mandate is 'specific' in that it clearly commissions this Judge to apply the dual motive analysis. It is not, however, a 'limited' mandate in the sense the Respondent argues.

[7]In fact, Mr. Odom came to learn, right before the November 23rd meeting, that Complainant had a grievance with respect to being denied a job at St. Lucie, a denial with which neither Mr. Odom nor Mr. Kappes had anything to do. Mr. Odom recalled trying to settle that grievance during a November 29th meeting. Mr. Harris was so adamant about not wanting Complainant back at St. Lucie that Mr. Odom had to go over his head to get approval from Mr. Conway. Although Mr. Odom was at this point aware of Complainant's performance and absentee issues, he had no reservations or concerns about Complainant's physical and mental ability to work either at Turkey Point or St. Lucie. (RT 593, 596-598) Mr. Odom felt bad about transferring a performance problem to St. Lucie, but felt that it was the best solution under the circumstances. Mr. Odom admits that he had begun to wonder about Complainant's competency, but not to the point where he would not have agreed to a transfer. (RT 599)

[8]Mr. Kappes did not discipline Complainant for harassing management because, as will be discussed below, he was on restriction as to how to handle Complainant. (RT 1911)

[9]The letters received by Respondent on December 20, 1988 were Complainant's November 8, 1988 letter to the DOL, copied to the NRC, and Complainant's December 16, 1988 letter to the DOL, copied to the NRC (CX 160). Prior to that, on December 14, 1988 Respondent received Complainant's November 28, 1988 letter to DOL, copied to the NRC (RX 93); on December 3, 1988 Respondent received Complainant's December 2, 1988 letter to the NRC (RX 97); and on November 1, 1988 Respondent received Complainant's October 31, 1988 letter to the DOL, copied to the NRC.

[10]During the remand proceeding, Complainant testified he did not remember when he saw RX 60. Respondent effectively used the original transcript to show Complainant saw the memo a reasonable period of time after it was issued in July. (RT 1252)

[11]Mr. Odom made this decision late in the day on December 16, 1988. While Mr. Odom made the decision, Mr. Kappes was the one who informed Complainant that he was being discharged. (RT 748, 1964, 2000)

[12]Complainant also stated he knows the law firm investigators were there to investigate the Koran and Boger incidents, but that he was suspicious when he heard that they were going up to St. Lucie because this looked like they were investigating Complainant.

[13]Mr. Odom believed his getting personally involved in the grievance resolution was a show of good faith on management's part in an effort to get beyond Complainant's barriers and get him to cooperate.

[14]No one at the NRC told Complainant that he could disobey a direct order.

[15]Mr. Kappes similarly testified that Complainant was not fired on November 23 because of Mr. Odom's standing directions to handle Complainant very carefully and because Mr. Odom still wanted Complainant's safety issues.

[16]If an I&C technician saw a problem in the procedures for doing a job, Mr. Odom stated he could bring that concern to his supervisor's attention. If the supervisor then instructed the technician to do the job and the technician still disagreed, Mr. Odom stated the technician "would have a responsibility to challenge it within reason." (RT 223) Furthermore, according to Mr. Odom, such a technician would not be subject to discipline.

[17]Form 3 also indicates an employee could go directly to the NRC. Both Mr. Odom and Mr. Kappes testified that they were not aware of any law or regulation or decision stating that they could not order Complainant to reveal his safety concerns to plant management. Mr. Odom stated he would not have given the order if he had been aware of such a law or regulation.

[18]RX 127, titled "Florida Power And Light Nuclear Plant Training Video First Draft: 1/14/86," actually reminds the employee that he or she has the right to report directly to the NRC. It also states, however, that FP&L "encourages and expects" the employee to ask his or her foreman or supervisor about his or her job or working conditions. (RX 127, at p. 32)

[19]This Administrative Procedure indicates it "provides one of the management methods of identifying, reporting, and correcting potential substantial safety hazards." The procedure further indicates that the employee "shall" report it to their immediate supervisor. (RX 128, Part 5.1) Turkey Point Quality Assurance procedures defined "shall" as directing a mandate. Mr. Odom was not sure, however, of how that definition applied to NRC Form 3. `

[20]Mr. Odom left it up to Mr. Kappes to inform Complainant of his restricted access and Mr. Odom does not know what reason Mr. Kappes gave Complainant for the restriction. On or about the 25th, the only feedback Mr. Odom received was that the access had been restricted.

[21]It should be noted that Complainant did not work on November 24.

[22]This Judge's review of RX 91 does not support Complainant's opinion of that exchange. The document reveals Complainant was asked whether or not he understood what Mr. Kappes had just explained to him, and that Complainant was, in this Judge's opinion, uncooperative in his response. (RX 91, at pp. 2-3)

[23]This Judge rejects Complainant's claim that he was fingered out. The evidence of record clearly establishes that employees suspected of excessive absenteeism were routinely dealt with in the same manner. (RX 110)

[24]Complainant believes he sent the NRC a compiled report of all of his safety concerns on December 5, 1988. (CX 4)

[25]In further regards to this November 30 telephone call, Mr. Odom stated he did not know whether Messrs. DeMiranda and Jenkins had the competence to judge what an immediate nuclear safety concern was. He believed that while the two may try, in good faith, to make such a judgment, they would not necessarily know what they were doing.

[26]The NRC memorandum summarizing this telephone call does not indicate Messrs. DeMiranda and Jenkins made this statement to Mr. Odom. (CX 127, plaintiff's exh. 11) The memorandum confirms Mr. Odom's testimony concerning this telephone call in all other respects.

[27]Mr. Odom feels Respondent was "bending over backward, quite frankly" to make the PWOs available to Complainant. (RT 483) As of November 23, however, Complainant still did not have them even though an attempt had been made to get them to him on at least one occasion, which Complainant found unacceptable to him. (RT 1466-68, 2005-07)

[28]He did not say he had chest pains or stomach problems. (RT 1420) According to Complainant, he had been experiencing these chest pains for several months, but did not contact a doctor until December. (RT 1428-29, 1133) (**See Generally** CX 90) He had, however, spoken with his wife, a licensed registered nurse, about his problems. (RT 1484)

[29]In the original proceeding, Complainant did not mention Mr. Harley mentioning safety concerns during this confrontation. (RT 1409-1410, 1412)

[30]In the original transcript, Complainant stated "The reason I gave Mr. Kappes was I am sick, but my mind set was I was not going to talk regarding my safety concerns." (RT 1427)

[31]Complainant explains on re-direct that he did not do this at 5:20 because he had already filled out his time ticket and he did not want to just go ahead and leave because an employee could get fired for that. (RT 1483)

[32]According to Mr. Odom, Complainant was insubordinate on the 23rd and the 30th, he was just not as insubordinate on the 23rd.

[33]I will note there is some discrepancy in the evidence of record as to whether Complainant informed Mr. Kappes that he suffered a medical disorder related to stress (RX 96) or whether he informed Mr. Kappes that he was going for stress tests. (RX 99) I hasten to add, however, that this makes little difference to the essence and impact of the call, which is that Complainant was clearly putting Respondent on notice that he had certain medical issues related to stress.

[34]Mr. Odom was aware that Complainant was on medication for gastritis, but he is not sure when or how he acquired that knowledge.

[35]Mr. Kappes informed Complainant that his job transfer to St. Lucie was canceled until the insubordination issue was resolved. (RT 1160) Complainant informed Mr. Kappes he viewed this as retaliation and that he was going to contact Region II of the NRC. Mr. Kappes had no response.

[36]Mr. Harley was the supervisor assigned to observe Complainant during his testing and Complainant stated this was difficult for him, based upon Mr. Harley's allegedly retaliatory conduct in connection with a temperature measurement job. (RT 1477) By November of 1988, when Mr. Harley denied Complainant's request for paid time off to go vote, Complainant believed Mr. Harley was "out to get" him.

[37]Complainant authorized Dr. Klapper *to speak with* Dr. Dolsey on December 15, 1988. (RT 1134)

[38]Complainant understood that he could refuse an examination based on fitness for duty and that he would receive a day off without pay. (RT 1151)

[39]Mr. Caponi was not privy to anything leading up to the request that Complainant be examined by Dr. Dolsey. (RT 1578) Of particular note is the fact that Mr. Caponi was not aware of a conversation early in the morning on December 16, where Complainant told Mr. Kappes he would not be examined. (RT 1605)

[40]In this regard, there is some testimony that Mr. Caponi would want to determine whether the order to see the Doctor was a condition of employment or a fitness for duty issue. (RT 1585)

[41]An evidentiary standard which, this Judge notes, requires a higher degree of proof than that standard applicable to Complainant Saporito's claim. **See Yule**, **supra**, at p. 4.

[42]The earlier insubordination consisted of complainant questioning a supervisor's judgment, whereas the incident which precipitated her termination consisted of failing to obey a direct order.

[43]When the determination of motive or purpose hinges entirely upon the degree of credibility to be accorded the testimony of interested witnesses, the credibility findings of the trier of fact are entitled to special weight and are not to be easily ignored. **Pogue v. U.S. Department of Labor**, 940 F.2d 1287, 1290 (9th Cir. 1991) (**quoting Loomis Courier Serv., Inc. v. NLRB**, 595 F.2d 491, 496 (9th cir. 1979).

[44]According to stipulation CX 143, Respondent had last received Complainant's October 31, 1988 letter to the DOL, copied to the NRC, on November 1, 1988, some twenty-nine (29) days prior to the holdover incident.

[45]The Secretary noted that while it might have been more prudent for complainant to comply with the order and then file his ERA claim, his assumption of the risk that he would be unable to prove discriminatory motivation in ordering the evaluation does not absolve respondent from wrongdoing in imposing the order in violation of the ERA. **Id.** at n. 6 (Sec'y 1/19/96).

[46]I do not specifically accept or reject this contention. On the one hand, this Judge finds Complainant's new found vivid recollection of Mr. Harley having used those words to be suspicious given his testimony at the original hearing. On the other hand, however, there is the handwritten note signed by Mr. Harley that he did inform Complainant that Mr. Odom wanted to see him about his safety concerns.

[47]The ALJ noted that respondent's proof fell short of establishing that complainant was terminated for insubordination in the sense of refusal to obey a lawful order.

[48]It may be reasonably inferred that Mr. Odom's December 12, 1988 conversation with the union, including those reasons he stated for the intended examination, was relayed to Complainant. Even without this inference, there are numerous other times that Complainant was personally informed by Mr. Kappes of the reasons for the examination.

[49]For example, Complainant reviewed the minutes of a June 28 meeting (RX 58) and testified he thinks Mr. Kappes was acting aggressively towards him during that meeting. He is impeached with the original transcript. (RT 1243) Complainant's testimony regarding the Koran incident is also impeached. (RT 1285-86) Complainant's testimony that Mr. Odom has to say "this is a direct order" if he is giving a direct order is impeached with the original transcript where he said those words did not have to be specifically used. (RT 1378)

[50]For example, Complainant lied twice on his employment application and was difficult at hearing in admitting it (RT 1199-1205), going so far as to say Respondent never asked whether or not his leaving those positions was voluntary.

[51]There were a number of times that a question had to be put to Complainant three times.

[52]For example, Complainant typically had no recollection of those facts leading up to the confrontations between himself and his supervisors (RT 1264-1274, 1276, 1279), although he vividly recollected the confrontations themselves.

[53]To this end, Complainant's examination of Mr. Caponi, the job steward who accompanied him to Dr. Dolsey's office, focused Mr. Caponi's attention on RX 102, the minutes of the December 16, 1988 meeting. Mr. Caponi is of the opinion, as a job steward, that it is not clear from these minutes whether Complainant was being ordered to see Dr. Dolsey as a fitness for duty issue. Complainant does not inquire of Mr. Caponi as to his opinion, as a job steward, as to the reasons as stated in the three previous meetings of December 12, 13 and 14.

[54]If the examination was so classified, Complainant would have probably been provided with the option of refusing to submit to the examination and, instead, receiving a day off without pay. (RT 1151)

[55]As previously mentioned, a complainant is granted leeway in conducting himself during protected activity. This legal concept should not, however, be stretched so far as to give complainants carte blanch to conduct themselves in whatever manner they deem appropriate.

[56]For example, Complainant stated at hearing that if he had not raised any safety concerns at Turkey Point in 1988, Respondent would have had no grounds to fire Complainant. (RT 1190) Complainant also stated at hearing that his protected activity protected him from discipline if that discipline was in any way connected to or at least in part brought on by that protected activity. (RT 1463) In his post-hearing brief, Complainant argues "On November 30, 1988, if Mr. Odom had not become knowledgeable of Mr. Saporito's nuclear safety concerns, Mr. Saporito would not have been insubordinate that day because Mr. Odom's meeting certainly related to his nuclear safety concerns; and Mr. Odom wouldn't have asked Mr. Saporito to come to his office if he didn't have knowledge that Mr. Saporito raised safety concerns." **See** Complainant's Post Hearing Brief on Remand, at p. 238.

[57]Complainant's tenuous train of argument is as follows: there would have been no reason for Mr. Odom to summons Complainant to his office if there had been no protected activity and, without this summons, there then would have been no reason to order Complainant to see Dr. Dolsey because the incident in the shop never would have occurred.

[58]**Diaz-Robainas**, **supra**, was a pretext case. The Secretary held that respondent's explanation for ordering psychological fitness-for-duty examination was pretextual where management delayed ordering that examination until July 1991, a date in close temporal proximity to complainant's expressed intent to go to the media, when complainant had first mentioned stress in February 1991. The Secretary concluded that respondent feared exposure of possible wrongdoing and imposed the examination order as a tool or tactic to discourage complainant from going to the press or the NRC. **Id.** at p. 10. Furthermore,

the Secretary rejected the ALJ's conclusion that certain actions evidenced the examination order was not motivated by retaliation and opined "these acts...could be viewed as a series of actions aimed at monitoring and discouraging protected activity" and did not overcome the "compelling evidence" of retaliation **Id.** at pp. 10-11. The decision is further explained in the Secretary's Order Denying Motion for Reconsideration, wherein it is reiterated that the explanation for the examination order was a pretext for silencing complainant's increasingly adamant complaints and his refusal to comply with the order, resulting in termination, was the culmination of those persistent complaints. **Secretary's Order Denying Motion for Reconsideration**, at p. 3 (Sec'y 4/15/96). Respondent's order that complainant undergo a psychological evaluation was unreasonable, illegitimate, and retaliatory, and culminated in complainant being fired on pretextual grounds. **Id.** at p. 4.

[59]The question is this: could Respondent have validly terminated Complainant if Complainant's only act of insubordination was the November 30 refusal to holdover or should Complainant have merely been suspended.

[60]Indeed, Complainant state he was "laid into" and chastised" for refusing a direct order during the meeting on November 25. (RT 1076; CX 95; RX 91) Even assuming the November 23 order cannot be held against Complainant because it is protected, there remains sufficient other warnings of the consequences of Complainant's insubordinate acts.

[61]I will briefly pause to note that Complainant attempted to liken his insubordination to an incident where a clerk or runner, the girlfriend of the nuclear operator on duty, was allowed to operate a switch in the reactor control room. The operator's license was pulled and he was required to be retrained. As Mr. Odom testified at hearing, although this was an instance of bad judgment and poor attitude, it was not an instance of insubordination.